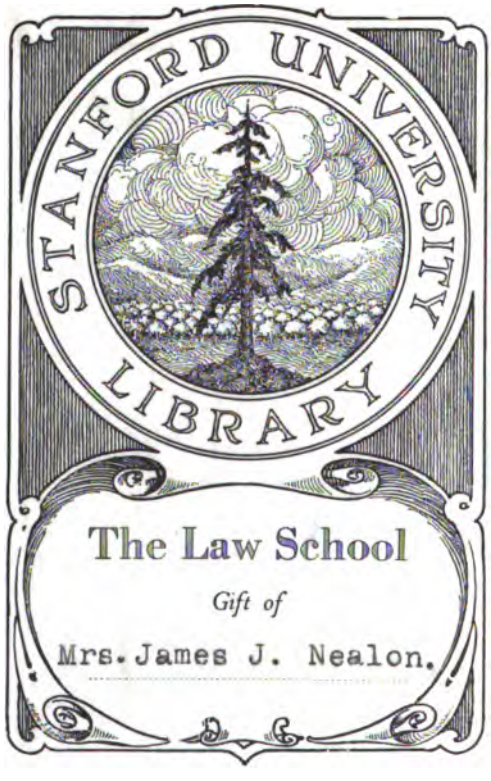
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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON

CRIMINAL LAW

BY

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A COMPANION BOOK
TO
CLARK ON CRIMINAL LAW (8D ED.)

ST. PAUL
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THE HORNBOOK CASE SERIES

IT IS the purpose of the publishers to supply a set of Illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the classroom. The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. With instruction and study along these lines, the student should secure a fundamental knowledge and grasp of the subject. The cases on a particular subject are sufficiently numerous and varied to cover the main underlying principles and essentials. Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.

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PREFACE

THIS collection of cases is compiled to accompany the third edition of Clark's Criminal Law, and is designed to illustrate the principles of the law there set forth. The cases are in large part reprinted from an earlier collection of cases compiled by the present editor.

W. E. M.

CASTINE, MAINE, July 5, 1915.

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HORNBOOK CASES

ON

CRIMINAL LAW

DEFINITION, NATURE, AND PUNISHMENT OF CRIME

I. Nature of Crime [1]

COMMONWEALTH v. WEBB.

(Supreme Court of Virginia, 1828. 6 Rand. 726.)

DANIEL, J. The defendant was presented by the grand jury for the superior court of Nottoway county for a public nuisance, in erecting a mill-dam across Little creek, in the said county, without lawful authority.

On this presentment an information was filed, containing two counts, charging in both, that by means of the said dam, the waters of the said creek had been rendered stagnant, and the air impure; concluding the first, to the common nuisance of all the citizens of the commonwealth, residing in the neighborhood; and concluding the second, to the common nuisance of the inhabitants around the pond, naming them particularly, and all other citizens of the neighborhood. To this information, the defendant pleaded not guilty, on which issue was taken, and two trials were had before the jury, who in both instances disagreed.

At a subsequent term, the attorney for the commonwealth, by leave of the court, amended his information, charging in substance the same fact, and concluding the first count, "to the great damage, and common nuisance of all the good citizens of this commonwealth, not only there residing and inhabiting, but also going, returning, passing and re-passing by the neighborhood of the said pond." The other count concludes, "to the common nuisance of all the citizens of the commonwealth."

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 1, 2.

To this information, the defendant demurred generally, and the attorney for the commonwealth joined in the demurrer. The said superior court adjourned the case to this court for novelty and difficulty, on the question, "What judgment ought to be given upon said demurrer?"

The decision of this question calls for a more precise discrimination between public and private nuisances than was necessary for the decision of the case of Com. v. Faris, 5 Rand. (Va.) 691.

In making this discrimination, the court has been ably assisted by the Attorney General and the counsel for the defendant, and the conclusion to which the court has arrived, is this: That, to constitute a public nuisance, the act done, or duty omitted, must affect injuriously some thing or right in which the community, as a body politic, have a common interest, and the facts producing this injury, and connecting it with such special public right or interest, must be both alleged and proved. To carry this matter further would obliterate every line that now marks the difference between public and private wrongs. The community have an interest in the preservation of the health and lives of its members; they have a right to see and provide that each shall breathe the air as pure as nature gives it. But this interest and this right in no manner differ from the interest in and right to secure the welfare of all its members, in every private relation. Both are provided for by private actions or public prosecutions, according to the nature of the case.

As it regards the case before us, we find it everywhere laid down that things done, or duties omitted, which affect the public interest, are public nuisances. Those, on the contrary, which affect particular individuals, are private nuisances, and redressed by private actions. We cannot find in any decided case the precise question before us considered, but this results from the fact that no attempt has been made to maintain a public prosecution for a nuisance, arising from a local fixture, the effects of which are not alleged and proved to be injurious to some distinct public right or interest, as contradistinguished from that interest which the public have in each of its members enjoying his own right. No precedent can be found of a prosecution of this character, which is not distinctly based on this idea. No adjudicated case condemns the allegations which thus connect the fact with the public interest, as surplusage or unnecessary.

But it has been strongly argued that notwithstanding these averments are constantly found in the indictments, in the reasoning of the judges upon the actual wrong committed, the principal stress seems to be laid on the injury done to the neighboring inhabitants, and the inconvenience to the public by the effect produced on highways, etc., is lightly regarded; from hence this public injury is called the shadow, while the injury to the neighbors is the real substance whereon the public prosecution is founded. It is readily conceded, that on the ques-

tion of the quantum of punishment, this argument is generally substantially correct, but we should find no difficulty in confining this punishment to the public grievance only, in every case where the parties more immediately concerned, are prosecuting their private remedies, or will not forego them. The practice of the courts, on indictments for breaches of the peace, furnishes the rule which should govern in such cases. The fact, that the injury to surrounding individuals is principally regarded in estimating the grade of the defendant's delinquency, may be well likened to the action of a father for debauching his daughter and servant, whereby he lost her service; the latter is the gist of the action, without which it cannot be maintained; but, in estimating the damages, the injury to the feelings and character of the father and his family, together with the degree of impropriety of the defendant's conduct, are almost exclusively regarded.

The necessity of thus restricting public prosecutions for nuisances is strongly enforced by a rule of law, which we find nowhere contradicted, that no private action can be maintained for a public nuisance, without special damage done to the party complaining. By special damage we understand an injury different in kind from that of which the public complains. If a local fixture which renders the air impure or uncomfortable to a neighborhood, without affecting any public right, as before described, could be made the subject of a public prosecution, it must be because all the citizens of the commonwealth are liable to be so affected. The injury thus sustained by any particular individual is of the same kind with that to which the public are thus liable, arising from the same cause, and affecting the same local situation. From the above rule it follows, that, if this be a public offense, no private action in such case could be maintained; but, if we suppose that the public prosecution is founded on the injurious effects of such fixture on the highway or other public right, then the private individual who, on his own land, off the said highway, sustains an injury from the same fixture, on account of its injurious effects on his habitation, complains not at all of an injury common to himself and the rest of the community, but of one to himself alone, and for which he of course may have his private remedy.

For these reasons, we conclude, in the language of some of the judges who decided the aforesaid case of Com. v. Faris, that to support the prosecution, on the information before us, it ought to be alleged and proved, that the obstructions placed in Little creek, in the county of Nottoway, produced a stagnation of the waters thereof, in or near a public highway, or some other place in which the public have such special interest. The general conclusion, that the stagnation of the said waters does injure all the citizens of the commonwealth will not cure the want of such special averment, because the facts stated do not warrant that conclusion. The attempt made, in some of the books referred to, to reconcile the cases which require this precise conclusion with

those which regard the indictment as good without, is unsatisfactory. It supposes that the general conclusion is called for only in cases where the public nature of the offence is not alleged in the special averments with sufficient certainty, but nowhere supposes that the absence of such averments may be so supplied.

The consequence is, that the amended information filed in this case is not sufficient, and that the defendant's demurrer to it should be sustained, and judgment rendered for him.

WILLIAMS v. STATE.

(Supreme Court of Georgia, 1898. 105 Ga. 606, 31 S. E. 546.)

LUMPKIN, P. J.[1] An indictment against G. W. M. Williams, found by the grand jury of Screven county and transferred for trial to the county court thereof, charged that the accused "did falsely and fraudulently represent to J. C. White that he, the said Williams, had purchased the Cuyler & Woodburn Railroad for the sum of $27,000, and that he had raised all of the purchase price except $100, and was then on his way to Savannah to pay the purchase money. By these false and fraudulent representations the said G. W. M. Williams fraudulently induced the said J. C. White to lend him, the said G. W. M. Williams, the sum of $100, which he promised to pay back within three days from the date of the loan. These representations, made as aforesaid, were all false and fraudulent, and were made by the said Williams for the purpose of defrauding the said White, and did in point of fact defraud the said White, contrary to the laws of the said state, the good order, peace, and dignity thereof." At the trial the state introduced testimony substantiating all the material allegations of the indictment. It distinctly appeared that, in the conversation between the accused and White which resulted in the former's procuring the loan, he claimed to be the owner of the railroad in question. For instance, he used the expression, "I don't want to incumber my road," and other language indicating a purpose on his part to create the impression that the railroad was his property. It was further shown by the state that White was actually defrauded of $100, and that Williams did not repay the loan as he had agreed to do. Evidence in behalf of the accused tended to show the following: After Williams had been arrested upon a warrant charging him with being a cheat and swindler, and before he was indicted, he made a settlement with White by delivering to him the promissory note of E. E. Wood & Co. for $100, which White accepted in full satisfaction of his demand against Williams, and

[1] Part of the opinion is omitted.

afterwards sold for $90. There was a verdict of guilty in the county court, and by his petition for certiorari Williams alleged error as follows: * * *

Second. The judge erroneously charged that "a settlement of the debt by White after the warrant had been sworn out, and the defendant was under arrest or under bond, would be no bar to the prosecution." * * *

We are also of the opinion that the second charge excepted to was free from error. That a fraud was perpetrated upon White plainly appeared. As a result of this fraud he was deprived of the possession and use of his money, and it is apparent from the evidence as a whole that there was a criminal intent on the part of Williams not to return the money at all. That he was subsequently forced to make restitution, which, as will have been seen, was only partial, did not relieve him of the consequences of his violation of the criminal statute, which was complete before his arrest. As well might it be said that one guilty of a larceny could escape prosecution by returning the stolen goods after being arrested for the offense. * * *

Judgment affirmed. All the Justices concurring.

WRIGHT'S CASE.

(Assizes, 1604. Co. Litt. 127a.)

In my circuit in anno 1 Jacobi regis, in the county of Leicester, one Wright, a young strong and lustie rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid.

REGINA v. CONEY.

(Queen's Bench Division, 1882. 8 Q. B. Div. 534.)

HAWKINS, J.[a] * * * At the Berkshire October Quarter Sessions, 1881, the defendants were convicted under the direction of Mr. Benyon, the chairman, upon two counts of an indictment. One charged them with an assault upon Charles Mitchell, the other with an assault upon John Burke; Mitchell and Burke being the combatants in a fight

[a] Part of the opinion is omitted, as are also the concurring opinions of Cave, Matthew, Stephen, Manisty, Pollock, and Denman, JJ., and Coleridge, C. J.

which took place at Ascot, on the 16th of June, 1881. The facts are fully set forth in the case reserved for the opinion of the Court of Criminal Appeal.

Two questions were argued before us: First, whether the combatants were guilty of assaults upon each other; and, secondly, whether the defendants were aiders and abettors in the fight, and therefore also rightly convicted. Upon the first question the defendants' counsel contended that, each of the combatants having assented to the fight, neither could be convicted of an assault upon the other. To this contention I cannot give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all. Christopherson v. Bare, 11 Q. B. 473; Reg. v. Guthrie, L. R. 1 C. C. R. 241, 243, and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action, upon the ground that no man can claim damages for an act to which he himself was an assenting party. Christopherson v. Bare. That case, however, was decided upon a point of pleading, and must not be considered as a direct authority on this subject. It is not necessary, however, upon the present occasion, to express any decided opinion upon the point; for, whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace, so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order. Per Burrough, J., in Rex v. Belingham, 2 C. & P. 234. He may compromise his own civil rights, but he cannot compromise the public interests.

Nothing can be clearer to my mind than that every fight, in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal, and the parties to it may be prosecuted for assaults upon each other. Many authorities support this view. In Rex v. Ward, 1 East, P. C. 270, the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and

yet it was held that the prisoner was properly convicted. To the same effect is the case of Reg. v. Lewis, 1 C. & K. 419, in which Coleridge, J., said: "When two persons go out to strike each other, each is guilty of an assault." See, also, Reg. v. Hunt, 1 Cox, C. C. 177, per Alderson, B.; Reg. v. Brown, 1 C. & M. 314, by the same learned Baron; and by Bramwell, B., in Reg. v. Young, 10 Cox, C. C. 371.

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury, or to cause angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace, nor are they calculated to be productive thereof. But if, under color of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other, by violence calculated to produce mischief, regardless whether hurt may be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault. Reg. v. Orton, 39 L. T. 293. Whether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings.

The cases cited of alleged indecent assaults on young children by their consent are no authorities to the contrary, and may all be disposed of in this one observation, viz., that the indecent impositions of hands charged in those cases as assaults neither involved, nor were calculated to involve, breaches of the peace, and therefore, being by consent, were not punishable as assaults, any more than they would have been had the objects of them been for the most innocent purposes. I think it wholly immaterial in considering cases of this description to inquire by whom the first blow was struck, for, as was said by Lindley, J., in Reg. v. Knock, 14 Cox, C. C. 1, "the right of self-defense does not justify counter blows struck with a desire to fight."

Upon the ruling of the chairman as to the illegality of the fight, I entertain, therefore, no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon each other.

Revised.

SPEIDEN v. STATE.

(Court of Appeals of Texas, 1877. 3 Tex. App. 156, 30 Am. Rep. 126.)

Burglary.

WHITE, J.[4] * * * As disclosed in the record, the facts are substantially as follows:

Pinkerton's Detective Agency, at Chicago, Ill., obtained, by some means, a number of letters and postal cards written by the defendant from Dallas, to a friend in Chicago, urging him to come to Dallas and join him in breaking into and robbing some of the banks in the latter city. It appears that Pinkerton forwarded those letters to John Kerr, a banker of Dallas, who immediately called a meeting of the bankers of the city and submitted the matter to them. The result of this meeting was that the bankers requested Pinkerton to send a detective to Dallas to work up the case. Deroso, a sergeant of Pinkerton's force, came, and, after an interview with the bankers, sent back to Chicago for Wood and McGuire, two detective aids who were to represent themselves to the defendant as professional burglars and induce him to enter some bank building in the nighttime, when they would procure his arrest.

After the arrival of Wood and McGuire they set to work to carry out this plan, keeping in constant communication with Deroso, and, through him, with the bankers, who were kept constantly informed as to the plans and movements of the parties. Finally it was agreed on all hands that the banking house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the arrangement, and the detectives were, in the adventure, working in their employ.

Pursuant to the plan agreed upon, Deroso, Hereford, a deputy sheriff of Dallas county, a Mr. Mixon, United States deputy marshal, and another party entered and took possession of the bank during the daytime, about 2 or 3 o'clock on Sunday, to remain therein until the burglary was effected and the defendant was arrested. About 1 o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in, spoke to the concealed parties, and went into the vault, when, after remaining about an hour, Wood went out, told Speiden, the defendant, that they wanted more help, and returned in a short time, and, coming in, closed the door after him. In a minute or two Speiden came in and closed the door, when the officers arrested him.

Now, as to the law of the case: To our minds it is clear that Deroso and the other detectives were the servants and agents of Adams & Leonard, and had full authority to consent to defendant's entry into

[4] Part of the opinion is omitted.

the bank, and that his entry was not only with their consent, but at their solicitation. The case is somewhat like that of a man being robbed by his own consent, although the supposed robbers did not know of the consent. Reanes' Case, 2 East, 734; McDaniel's Case, Fost. 121.

In Tennessee, where the prisoner had arranged with a negro, during the days of slavery, to steal him, and the negro informed his master, who told him to carry out the agreement between the prisoner and himself, which was done, and the prisoner was arrested in the act, it was held that, to constitute larceny of a slave, it must appear that the accused had possession of the slave, and that the possession was obtained without the consent of the owner. Kemp v. State, 11 Humph. (Tenn.) 320.

Mr. Bishop says: "The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently, even if there is a consent, it is not within the knowledge of him who does the act. Here we see * * * that, supposing the consent really to exist, and the case to be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not know of the existence of the circumstances which prevented the criminal quality from attaching. * * * A common case is that of burglars who, intending to break into a house and steal, tempt the servant of the occupant to assist them, and the servant, after communicating the facts to his master, is authorized to join them in appearance. Under such circumstances, clearly, the burglars are not excused for what they do personally; but it seems, if the servant opens the door while they enter, they are not held criminal for this breaking thus done by the servant, acting under command of the occupant of the house broken." 1 Bishop's Cr. Law, § 262. See, also, section 263.

The case of Regina v. Johnson and Jones, 1 Car. & M. (41 Eng. C. L. R.) 123, is in point. In that case the court say: "Cole, the groom, it is true, appeared to concur with the prisoners in the commission of the offense. But in fact he did not really concur with them, and he, acting under the direction of the police, must be taken to have been acting under the direction of Mr. Drake the prosecutor. Under the circumstances of this case the prisoners went into a door which, it seems to me, was lawfully open. Therefore neither of them was guilty of burglary."

In Eggington's Case, which is also in point, it was held "that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and the acts of Phillips (the servant) were his acts." 2 East, 666.

Another case in point is Allen v. State, the substance of which is that, "when the proof showed that the prisoner proposed to a servant a plan for robbing his employer's office at night; that the servant disclosed the plan to his employer, by whom it was communicated to the

police; that the master, acting under the instructions of the police, furnished the servant with the keys of his office on the appointed night; that the servant and the prisoner went together to the office, when the servant opened the door with the key, and both entered through the door, and were arrested in the house by the police—held that there could be no conviction of burglary." 40 Ala. 334, 91 Am. Dec. 477. See, also, 2 Whart. Cr. Law, § 1540; Roscoe's Cr. Ev. 345.

In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They (the detectives) had the legal occupancy and control of the bank. Two of them made arrangements with defendant to enter it; and defendant, when arrested, had entered the bank at the solicitation of those detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent.

The judgment of the lower court must be reversed, and the cause remanded.

Reversed and remanded.

REGINA v. LONGBOTTOM et al.

(Norfolk Circuit, 1849. 3 Cox, C. C. 439.)

The indictment charged that the two prisoners feloniously killed and slew John Truman, by driving over him with a gig.

O'Malley and E. Rodwell, for the prosecution, proved that the two prisoners, who lived in Ipswich, had gone to Bentley on the day named in the indictment in a gig, and that on their return at night they were observed to be in a state of partial intoxication. At several places they drove along the high road at a very rapid pace, and when they got within two miles of Ipswich they met three men. At that time they were laughing and driving rapidly down a hill, the top of which was thickly shaded with trees. When the three men got to the trees they found a man lying insensible in the middle of the road, presenting all the appearance of having been just run over by some vehicle. They took up the man, who shortly afterwards died. On inquiry it turned out that the deceased was a man who had been deaf from childhood, but had, in spite of his infirmity, contracted an inveterate habit of walking at all hours in the middle of the road. Against the probable consequences of an indulgence in this habit he had been frequently warned, but without effect.

D. D. Keane, for the prisoner, Longbottom, submitted, at the close of the case for the prosecution, that he ought to be acquitted, inasmuch as it appeared that the deceased had contributed in a great measure, if not altogether, to his own death by his own obstinacy and negligence. There was, moreover, no proof that the prisoners were driving at any extraordinary pace; while it appeared that they were

in the middle of the road, and that the deceased was walking just where he ought not to have been, reference being had to the lateness of the hour, the darkness of the place, and his peculiar infirmity, which ought to have induced him to refrain from the selection of the most frequented part of the high road as that on which alone he would walk. No accident could possibly have occurred to the deceased, if he had been at the side of the road where foot passengers always walked. He had, therefore, contributed to his own death, and the question was whether that fact did not exonerate the prisoners from such a charge as the present. This might be tested by analogy with a civil action under Lord Campbell's act. Under that statute the representatives of the deceased could not maintain an action for compensation against the prisoners, as he had himself been guilty of negligence; so, in this prosecution, it was contended that the prisoners could not be convicted of the crime of manslaughter.

ROLFE, B. I cannot stop the case; for, whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that, if any one should drive so rapidly along a great thoroughfare leading to a large town as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law; and, if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. I do not at all recognize the analogy which has been put with regard to an action under Lord Campbell's act and a charge of felony; and I abstain from giving any opinion as to the question whether, under the circumstances here proved, the representatives of the deceased would be precluded from maintaining an action for compensation against the prisoners. But there is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality, and there is no balance of blame in charges of felony; but, wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse intrusted to their care, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.

Verdict, guilty.

THE CRIMINAL LAW—HOW PRESCRIBED

I. The Common Law [1]

UNITED STATES v. WORRALL.

(Circuit Court of United States, Pennsylvania District, 1798. 2 Dall. 384, Fed. Cas. No. 16,766, 1 L. Ed. 426.)

The defendant was charged with an attempt to bribe Tench Coxe, the Commissioner of the Revenue, the indictment containing two counts. Verdict—Guilty on both counts of the indictment.

Dallas, who had declined speaking on the facts before the jury, now moved in arrest of judgment.

Rawle, District Attorney, contra.

CHASE, Justice.[2] Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject. The indictment cannot be maintained in this court.

Rawle, answering in the affirmative, CHASE, Justice, stopped Mr. Levy, who was about to reply, in support of the motion in arrest in judgment, and delivered an opinion to the following effect:

CHASE, Justice. This is an indictment for an offense highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dismiss, at once, everything that has been said about the Constitution and laws of the United States.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state Constitution and policy, which do not affect him in his relation to the United States; for the Constitution of the Union is the source of all the jurisdiction of the national government, so that the departments of the government can never assume any power that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases which the eighth section of the first article designates, there is a power granted to Congress to create, define, and punish crimes and offenses, whenever they shall deem it necessary and proper by law to do so for effectuating the objects of the government; and, although bribery is not among the crimes and offenses specifically mentioned, it is certainly included in this general provision. The question, however,

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 4.

[2] The statement of facts is abridged and part of the opinion is omitted.

does not arise about the power; but about the exercise of the power—whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal. Now, it appears to my mind to be as essential that Congress should define the offenses to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction.

It is attempted, however, to supply the silence of the Constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offense which has been committed: but in my opinion, the United States, as a federal government, have no common law, and, consequently, no indictment can be maintained in their courts for offenses merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as by the judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence he who shall travel through the different states will soon discover that the whole of the common law of England has been nowhere introduced, that some states have rejected what others have adopted, and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another, but the common law of England is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court.

But the question recurs, when and how have the courts of the United States acquired a common-law jurisdiction in criminal cases? The United States must possess the common law themselves before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England, the Constitution does not create it, and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England, or modified, as it exists in some of the states; and of the various modifications which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offense is at this time cognizable in a state court. But certainly Congress might have provided by law for the present case, as they have provided for other cases of a similar nature; and yet if Congress had ever declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject. * * *

II. Statutes [3]

HARTUNG v. PEOPLE.

(Court of Appeals of New York, 1860. 22 N. Y. 95.)

DENIO, J.[4] * * * 2. This leads me to the second question to be considered, namely, whether it is competent for the legislature, after the conviction of a person prosecuted for murder, to change the punishment which the law had annexed to the offence, for another and different punishment, as was attempted to be done in this case. It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offences of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes.

[3] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 5, 6.

[4] Part of the opinion is omitted.

No state shall pass any ex post facto law, is the mandate of the Constitution of the United States. The present question is, whether the provision under immediate consideration is such a law, within the meaning of the Constitution. I am of opinion that it is. The scope and apparent intention of the act of 1860 is to reduce the punishment for murder, in certain cases. At present, we have no concern with the new arrangement, for in that respect the act is prospective. But the substituted punishment is made applicable to offences committed under the old law, where convictions have already been had. Persons convicted of murder, as that offence was declared by the Revised Statutes, where the judgment has not been executed, are to be punished as though convicted of murder in the first degree under the act of 1860. To abolish the penalty which the law attached to the crime when it was committed, and to declare it to be punishable in another way, is, as it respects the new punishment, the essence of an ex post facto law. Fletcher v. Peck, 6 Cranch, 87–138, 3 L. Ed. 162. In this case, Chief Justice Marshall defined an ex post facto law to be, one which rendered an act punishable "in a manner in which it was not punishable when it was committed." Chancellor Kent has expressed his approval of that definition, which, he says, is distinguished for its comprehensive brevity and precision. 4 Kent, 409. Judge Chase, in Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, stated his apprehension of what was meant in the Constitution by the term in question as follows: He said such laws were, "first, any law which makes an act done before the passing of the law, and which was innocent when done, criminal; second, any law which aggravates a crime, and makes it greater than it was when committed; third, any law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; fourth, any law which alters the legal rules of evidence."

Neither of the cases in which these remarks were made, involved any question as to the kind or degree of change in the punishment of an offence already committed, which might be made without a violation of the Constitution. A rule upon that subject is now to be laid down for the first time. In my opinion, then, it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offences, as changes in the manner or kind of employment of convicts

sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the act of 1860, in the punishment of existing offences of murder, does not fall within either of these exceptions. If it is to be construed to vest in the Governor a discretion to determine whether the convict should be executed, or remian a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to sentence. If he grants it, his jurisdiction of the case ends.

The act in question places the convict at the mercy of the Governor in office at the expiration of one year from the time of the conviction, and of all his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and the execution of not less than four, nor more than eight weeks. Par. 12. If we stop here, the change effected by the statute is between an execution within a limited time to be prescribed by the court, or a pardon or commutation of the sentence during that period, on the one hand, and the placing of the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if even that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law.

The law, moreover, prescribes one year's imprisonment, at hard labor, in a state prison, in addition to the punishment of death. In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. True, the concluding part of the judgment cannot be executed unless the Governor concurs, by ordering the execution. But as both parts may, in any given case, be inflicted, and as the convict is consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an ex post facto law. It changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed. It is enough, in my opinion, that it changes it in any

manner except by dispensing with divisible portions of it; but, upon the other definition announced by Judge Chase, where it is implied that the change must be from a less to a greater punishment, this act cannot be sustained. * * *

Judgment reversed and new trial ordered. All the other Judges concurring.

STEEL v. STATE.

(Supreme Court of Indiana, 1866. 26 Ind. 82.)

Appeal from the Ohio Circuit Court.

RAY, J. This was an indictment for seduction. The appellant was tried and convicted. The verdict of the jury imposed imprisonment in the county jail for thirty days, and assessed also a fine of two hundred and seventy-five dollars. The abstract complies with the rule of this court as to one point only, and therefore the only point we shall determine is whether the verdict is contrary to law.

The statute provides that the person convicted "shall be imprisoned in the state prison for not less than one, nor more than three years, and fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months." 2 G. & H. par. 15, p. 441.

This language authorizes the jury to impose a fine only in cases where the circumstances attending the commission of the offense authorize the imprisonment of the offender in the state prison. This is the plain import of the words used. The rule to be observed in the construction of penal statutes is thus stated by Chief Justice Marshall: "The rule that penal statutes are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the right of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. * * * The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37.

But an examination of other sections of the same statute will disclose that where the legislature clearly intended to add the fine to imprisonment, either in the state prison or in the county jail, they have expressed such intention in language of no doubtful significance. The twentieth section provides, that upon conviction of petit larceny, the offender shall be fined, imprisoned in the state prison and disfran-

chised, or fined, disfranchised and imprisoned in the jail of the proper county.

The ability of the legislature to express an intention clearly is not, therefore, to be questioned, and it is not our province to add to the penalties imposed.

The judgment is reversed, and the cause remanded for a new trial.

COMMONWEALTH v. CARTER.

(Court of Appeals of Kentucky, 1893. 94 Ky. 527, 23 S. W. 344.)

PRYOR, J. An indictment was returned in the Graves Circuit Court against Mark Hubbard and two others, charging them with breaking into the store-house of one Boaz. The testimony showed that Hubbard took the window of the house out and his confederates stood watch a short distance from the store-room, and when the goods were removed by Hubbard, Carter and James, two confederates, took charge of them.

There was a separate trial demanded, and Ed Carter being first tried was acquitted upon a peremptory instruction based upon the case of Stamper v. Commonwealth, 7 Bush. 612. There can be no doubt of the correctness of the rule that, in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, others can not be brought within its provisions as principals upon proof that they were aiders and abettors. The case of Frey v. Commonwealth, reported in 83 Ky. 191, was an indictment under a statute enacted to prevent the destruction of bastard children by the mother. The statute reads: "If any woman be delivered of any issue of her body, which, being born alive, would be a bastard, shall endeavor * * * to conceal the birth thereof, * * * she shall be confined in the penitentiary," &c. Gen. St. 1888, c. 29, art. 4, § 14. This statute was intended to apply alone to the mother, and illustrates the distinction between the cases.

In Evans v. Commonwealth, 12 S. W. 768, 769, 11 Ky. Law Rep. 573, the statute provided that "if any one shall wilfully and unlawfully burn" any house whatever, he shall be confined in the penitentiary. This statute was held to apply to aiders and abettors. Those who were present aiding and abetting in such cases are as much principals as the ones applying the torch or entering the building, and the doctrine of Stamper v. Commonwealth makes the rule too broad when saying that, where the offense is created by statute against one actually committing the offense, those aiding and abetting are not amenable as principals to its provisions. There is as much reason for punishing the aiding and abetting in a felony created by statute as there is in a felony at common law. So the doctrine of Stamper v. Commonwealth is overruled; but

where in cases it is plain from the nature of the offense made a felony by statute, that its provisions were only intended to affect the party actually committing the offense, the doctrine of Stamper v. Commonwealth should apply.

As this is an appeal by the Commonwealth, the clerk is directed to certify the opinion to the court below.

COMMONWEALTH v. COOLEY.

(Supreme Judicial Court of Massachusetts, 1830. 10 Pick. [27 Mass.] 37.)

PER CURIAM.[5] * * * The defendant moves in arrest of judgment, that the crime for which he is indicted is not an offence at common law; and if it is, that the common law on this subject has been superseded by our statute of 1814–15, c. 174. We think it clear that it is an offence at common law, and there is an express decision to that effect in 2 T. R. 733. The reason why cases of this sort are not to be found in the earlier reports is very obvious, namely, that the dissection of human bodies was not so extensively practised in former times. And this will account for the fact, that few, if any prosecutions at common law for this offence, have taken place in this commonwealth.

The question then is, whether the common law has been superseded here by the statute of 1814. And the Court are of opinion that it has been. The whole subject has been revised by the legislature. The time for prosecuting the offence, and the punishment are limited by the statute, and provision likewise is made for the removal of dead bodies. A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first; Bartlett v. King, 12 Mass. R. 545; Nichols v. Squire, 5 Pick, 168; and in the case of a statute revising the common law, the implication is at least equally strong. At common law it was criminal to dig up and remove a dead body; but that would not now be an offence in this commonwealth, since the statute makes provision for the removal of a dead body under a license. If the common law were in force, it should seem that the license would not be a defence to an indictment at common law. The common law and the statute would be at variance with each other. Judgment arrested.

[5] The statement of facts and part of the opinion are omitted.

STATE v. MANSEL.

(Supreme Court of South Carolina, 1898. 52 S. C. 468, 30 S. E. 481.)

Indictment against Adam Mansel for taking orders for whisky. From judgment against defendant, he appeals.

GARY, J. The appellant was indicted, tried, and convicted, at the July, 1897, term of the Court for Pickens County, for a violation of section 41 of the Dispensary Act, approved in March, 1896—22 Stat. 147—which is as follows: "Section 41. That it shall be unlawful for any person to take or to solicit orders, or to receive money from other persons for the purchase or shipment of any alcoholic liquors for or to such other persons in this State, except for liquors to be purchased and shipped from the dispensary; and any person violating this section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term of not less than three months nor more than twelve months, or by a fine of not less than $100 nor more than $500." The indictment alleged that the offense was committed on the 13th of March, 1897. The dispensary act of 1896 was amended by an act, approved 5th March, 1897, by striking out section 41, hereinbefore mentioned—22 Stat. 541. The act of 1897 went into effect on the twentieth day after its approval by the executive. The offense was, therefore, committed while the act of 1896 was in force and effect.

Upon the hearing of the case on appeal, the appellant raised the question that the Court of General Sessions did not have jurisdiction of the case, as the section of the statute under which the defendant was indicted was repealed before he was convicted and sentenced. The following principles are deduced from the authorities, where a person commits an offense under a statute which is repealed by a subsequent statute before sentence is pronounced upon him:

1. When the second act prescribed a greater punishment than the first act, the offending party may be punished under the first act. 2. When the punishment in the second act is less than is prescribed in the first act, the party convicted can be punished only to the extent prescribed in the second act. 3. When a statute contains a section prescribing a punishment for a violation of the section, and this section is repealed after a party has violated the section, but before sentence is imposed upon him, he cannot be punished for such violation, or stated in another form: 4. When the second act repealing the first act makes no provision for punishment, the Court is without jurisdiction in the premises, and cannot impose sentence upon the party convicted. The question of jurisdiction raised by the Appellant must be sustained. As the Court did not have jurisdiction of the case, it would not be proper for this Court to consider the other questions raised by the exceptions.

It is therefore the judgment of this Court that the judgment of the Circuit Court be reversed, and the indictment quashed for want of jurisdiction.

Mr. Justice POPE concurs in result.

CITY OF KANSAS v. CLARK.

(Supreme Court of Missouri, 1878. 68 Mo. 588.)

SHERWOOD, C. J. The defendant prosecuted under an ordinance for keeping a gaming table contrary thereto, was convicted before the recorder, and appealed to the criminal court, where the defendant being acquitted, the city has appealed.

I. The transcript from the recorder shows the arrest and conviction, on the 30th day of September, 1874, and then a few lines below, the granting of an appeal. We will presume, therefore, that the appeal was taken on the day of the arrest and conviction, since it apparently was granted on that day, and since, also, we may well presume that the recorder would not grant an appeal unless applied for before the expiration of ten days. The motion of the city to dismiss the appeal taken to the criminal court, because not taken within that time, was properly overruled.

II. The provisions of 2 Wag. Stat. § 7, article 4, p. 895, relative to the effect of the repeal of statutory provisions, has no application to the present case, the present prosecution being founded, not on a statute, but on a city ordinance, there being an essential difference between the two. If, however, the ordinance which counsel for the city refers to in his brief as being of a similar nature to the statute above mentioned, were contained as stated in the bill of exceptions, this would be no doubt sufficient, because the same power which could enact ordinances could also provide that the repeal of them should not affect any pending prosecution; but no such ordinance as that counsel refers to can be found in the record, having, doubtless, been omitted therefrom through inadvertence. In the absence, therefore, of such an ordinance, we must sanction the action of the court in holding that the repeal of the ordinance whereon the prosecution was bottomed abated that prosecution, and in giving on that ground the declaration in the nature of a demurrer to the evidence.

III. The only question remaining is, as to the city's right of appeal from a judgment of acquittal. Our statute, 2 Wag. Stat. pars. 13, 14, p. 1114, has no bearing on this question, as those sections relate only to appeals by the State. Nor do we regard the violation of the ordinance under consideration as a crime, since "a crime * * * is an act committed in violation of a public law" (4 Black. Com. 5); a law

co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty. Williams v. City Council of Augusta, 4 Ga. 509. In the City of Goshen v. Croxton, 34 Ind. 239, it was held that though a suit before the mayor to recover a penalty for violation of a city ordinance was instituted by the issuance of a warrant and the arrest of the defendant, yet that such a procedure was but a civil suit. In Baldwin v. City of Chicago, 68 Ill. 418, it was held that a proceeding by the city for a violation of its charter was civil in form and only quasi criminal in character, and that the city under a charter provision allowing appeals and changes of venue from police justices in all cases was as much entitled as any other suitor to an appeal, although not expressly named in such provision. Here, however, the charter of plaintiff gives direct recognition to the right of the city to appeal "in any judicial proceeding." Laws 1875, p. 262, § 10.

Holding these views, we should reverse the judgment and remand the cause, but for the fact that the ordinance whereon this prosecution was based, was repealed, and no ordinance has been preserved in the bill of exceptions authorizing the prosecution of actions for penalties which accrued to the city prior to the repeal of the ordinance which had been violated. Judgment affirmed. All concur, except NAPTON and HOUGH, JJ., who dissent.

HOUGH, J. (dissenting). The City of Kansas is authorized by its charter to pass ordinances for the suppression of gaming and gambling houses, and to punish violations thereof by fine and imprisonment. Acts of 1875, 204, 207, art. 3, par. 1. Where an offense, which is declared to be a crime by the laws of the State and punishable thereunder, is also made punishable under the charter and ordinances of the city, a conviction, or acquittal, of such offense by a municipal corporation court, is a bar to a prosecution for the same offense in the State courts. State v. Simonds, 3 Mo. 414; State v. Cowan, 29 Mo. 330; State v. Thornton, 37 Mo. 360. It would seem, therefore, that a prosecution for gambling, in the corporation court, upon an information filed by the city attorney, should be regarded as a criminal prosecution. In the case of the State v. Gordon, 60 Mo. 383, it was held, that exclusive jurisdiction was conferred upon the city of Liberty by its charter to punish certain crimes committed within its corporate limits. It could not certainly be seriously contended that proceedings instituted by the city for that purpose were not criminal proceedings, and surely the fact that the jurisdiction is concurrent instead of exclusive, can make no difference in the nature of the proceedings. The Legislature declares the crime and the city is authorized to punish it. In such cases the city simply exercises a delegated authority; it acts

for, and in lieu of, the State, and is, therefore, entitled to appeal in those cases only in which the State would have a right of appeal, if the prosecution were conducted in its name. Vide, also, sections 2 and 3 of the act establishing the criminal court of Jackson county. Acts 1871, p. 110, §§ 2, 3. Section 10, art. 13, of the city charter (Acts 1875, p. 262) does not give to the city a right of appeal in any case.

NAPTON, J., concurs.

STATE ex rel. ERICKSON v. WEST.

(Supreme Court of Minnesota, 1889. 42 Minn. 147, 43 N. W. 845.)

MITCHELL, J.* Upon complaint and warrant the defendant was arrested, tried, and convicted before the municipal court of Minneapolis of a violation of a city ordinance relative to misdemeanors, breaches of the peace, and disorderly conduct, and sentenced "to pay a fine of $100, and be imprisoned in the workhouse of the city for the period of 90 days, and, in default of payment of said fine, be committed for the further period of 90 days in addition thereto." This sentence was in accordance with the provisions of the ordinance, and no question is made but that the ordinance is authorized by the city charter. Neither are we referred to any other ordinance amending the one in question. Another ordinance provides for the establishment of a city workhouse, and for keeping at hard labor therein any person convicted of an offence before the municipal court subjecting such offender to imprisonment under the ordinances of the city. On this judgment of conviction a mittimus was issued, committing the defendant to the custody of the superintendent of the workhouse, to be by him there kept at hard labor for the period of 90 days, and also the further period of 90 days unless he should sooner pay the $100 fine or be sooner discharged by law. Upon a writ of habeas corpus the defendant was discharged by a judge of the district court, on the ground that his imprisonment was illegal. From this order the state appeals.

The point made against the judgment of the municipal court is that it was absolutely void, because that court had no jurisdiction to try the case. The contention is that violations of municipal ordinances, punishable by fine or imprisonment, are "criminal offences" within the meaning of article 1, par. 7, of the constitution of the state, which provides that "no person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except * * * in cases cognizable by justices of the peace," which last are, by article 6, par. 8, of the same instrument, limited to cases where punishment does not exceed three months' imprisonment, or a fine not

* Part of the opinion is omitted.

exceeding $100. It is very clear that where the punishment may be both fine and imprisonment a criminal offense is not within the jurisdiction of a justice of the peace. Hence it follows, if violations of municipal ordinances are criminal offences within the meaning of the constitution, that wherever the prescribed punishment, as in the present case, may exceed three months' imprisonment or $100 fine, a person can only be held to answer for them on presentment or indictment of a grand jury. * * *

Hence, whether it is within the power of the legislature to confer upon the municipal or any other court jurisdiction to try, on complaint, and without indictment, cases for violations of municipal ordinances, where the punishment prescribed may exceed 90 days' imprisonment or $100 fine, resolves itself into the question whether such offences are criminal within the meaning of article 1, par. 7, of the constitution. * * *

The question now before us is therefore res integra, and our conclusion is that offences for the violation of municipal ordinances, to which a penalty, such as fine or imprisonment, is attached as a punishment, are "criminal offences" within the meaning of the constitutional provision referred to. They come strictly within the definition of "crimes or criminal offences." The terms "crime," "offence," and "criminal offence" are all synonymous, and ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding. As said in State v. Cantieny, 34 Minn. 1, 24 N. W. 458, the term includes any punishable violation of law, the doing that which a penal law forbids, or omitting to do what it commands, and hence includes all violations of municipal ordinances punishable by fine or imprisonment. A municipal ordinance is as much a law for the protection of the public as is a criminal statute of the state, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole state, and in both cases alike the punishment is imposed for the violation of a public law. If the state itself, directly, should make the act an offence, and prescribe the punishment, there could be no question but that the act would be a "crime" and the prosecution of it a "criminal prosecution," within the meaning of the constitution; and how can it make any difference, either in the intrinsic nature of the thing or in the consequences to the accused, whether the state does this itself, or delegates the power to pass the law to the municipal authorities? Again, if the provisions of the constitution do not apply to such prosecutions, there is practically no limitation upon the power of the legislature to delegate to these municipalities authority to try and punish summarily, without indictment, for violations of their ordinances, except, possibly, the implied and somewhat indefinite one that the punishment shall

not be cruel, unusual, or disproportionate to the offence. The exercise of any such unlimited and indefinite power to summarily prosecute and punish would result in gross violations of the spirit and evident meaning of the constitution.

But, finally, if these are not "criminal offences," and convictions of them convictions of "crime," within the meaning of the constitution, then, under article 1, par. 2, of that instrument, forbidding "involuntary servitude in the state, otherwise than in the punishment of crime whereof the party shall have been duly convicted," a person convicted of a violation of a municipal ordinance could never be kept at hard labor during the term of his imprisonment, and the police power of municipalities would be deprived of what has been from time immemorial its most efficient and salutary means of preserving good order and enforcing obedience to their by-laws, as well as of protecting the health and morals of those convicted of the violation of such laws. There is nothing better settled than that enforced labor is "involuntary servitude" within the meaning of such constitutional provisions, and there is no room for construing the word "crime" in this connection as used in a different sense from that in which the expression "criminal offence" is used in section 7.

We are not called upon to determine what or how severe penalties the legislature may authorize municipal corporations to impose for violations of their ordinances, or how extensive criminal jurisdiction it may confer upon their municipal courts; but we are quite clear that violations of such ordinances to which a punishment is attached are "criminal offences"; and if the prescribed punishment is or may be greater than three months' imprisonment, or $100 fine, the accused can be required to answer for them only upon the indictment or information of a grand jury; and if the legislature assumes to confer upon any court jurisdiction to try such cases, it must provide the appropriate judicial machinery, to wit, a grand jury, for doing this in a constitutional way, which has not been done in the case of the municipal court of Minneapolis. As now constituted, that court has no jurisdiction to try any criminal case, either under the state laws or city ordinances, where the prescribed punishment exceeds three months' imprisonment of $100 fine. It follows that that court had no jurisdiction to try a case for a violation of the ordinance under which the defendant was convicted, and that its judgment therein was therefore absolutely void, and defendant's imprisonment illegal, and without authority of law. The judgment being not merely erroneous or irregular, but absolutely void for want of jurisdiction to try the case at all, or to render any judgment whatever therein, there is no question under any of the authorities but that this may be taken advantage of on habeas corpus, and the prisoner discharged. This case and those of State ex rel. Abel, Bunnell, Miller, Norman Olson, and Conley, respectively, are all alike, and in each the order appealed from is affirmed.

THE MENTAL ELEMENT IN CRIME

I. Motive Not Intent [1]

SCHMIDT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit, 1904. 133 Fed. 257, 66 C. C. A. 389.)

GILBERT, Circuit Judge.[2] The plaintiff in error was indicted and prosecuted in the United States Circuit Court for the District of Washington upon an indictment containing ten counts, in each of which he was charged with swearing falsely in certain naturalization proceedings pending in the superior court of the state of Washington for Walla Walla county. * * *

Error is assigned to the refusal of the court to instruct the jury "that, when the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence; and in this case, if the jury find upon careful examination of all the evidence that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider, in connection with all the other evidence in the case, in making up their verdict."

This instruction, so requested, while proper in some cases, had no rightful application to the evidence in the case before the court. It was clearly proven by the direct testimony of witnesses, and it was not disputed, that the plaintiff in error went to these aliens, who had not been in the United States the requisite time to entitle them to citizenship, and actively induced them to appear before the court and take out their final papers, and in that connection falsely testified before the court as charged in the indictment. The jury may inquire into the motive of a defendant when it is necessary to resort to it in arriving at the ultimate fact that it was he who committed the crime charged. The motive then becomes an aid in completing the proof of the commission of the act; and in such a case it is proper to charge the jury that the absence of motive, if they fail to find one, may be taken into consideration in determining the question whether the crime was committed by the accused or by some other. The instruction is particularly applicable to cases where the proof consists in

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 14.

[2] Part of the opinion of Gilbert, Circuit Judge, and all of the dissenting opinion of Ross, Circuit Judge, are omitted.

circumstantial evidence. In such a case it may be controlling. People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846. That the plaintiff in error did falsely testify was not denied. His motive in so doing was not disclosed, and it was not necessary that it should be. While the prosecution is never required to prove a motive for the crime, it is always permitted to do so. In the present case the proof was not circumstantial, but was direct, and was undisputed. To have given the charge requested would have been to tell the jury that they were at liberty, in determining whether they would give credence to the positive and uncontroverted testimony of witnesses to the overt act of the plaintiff in error, to be influenced by the fact that they failed to find a motive for his act. Such is not the law.

The judgment of the District Court is affirmed.

REX v. REGAN.

(Central Criminal Court, 1850. 4 Cox, C. C. 335.)

The prisoner was indicted for maliciously and feloniously setting fire to a certain building, with intent to injure one Joseph Adams.

From the evidence it appeared that the prisoner had given notice of other fires, and had claimed the reward usually paid on such occasions at the engine station, and he had apparently no other motive in setting fire to the premises in question than the expectation of getting such reward.

Payne, for the prisoner, contended before the jury that if they believed that the prisoner's intent was not to injure the prosecutor, but merely to obtain the reward for giving the earliest information, that he could not be convicted upon the indictment.

ERLE, J. I entirely dissent from this view of the case. If the prisoner willfully set fire to the premises, the jury will be perfectly justified in finding that his intent was to injure the person whose property they were, and who would necessarily be injured by such an act, although he might have an ulterior object of obtaining the reward. There have been several cases recently of persons administering poison to others for the purpose of obtaining the money for which their lives were insured, but no one ever dreamed that, because they were actuated by such a motive, they would be entitled to an acquittal when indicted for administering poison with intent to kill.

The prisoner was found guilty.

II. Specific Intent[3]

REGINA v. PEMBLITON.

(Court of Criminal Appeal, 1874. 12 Cox, C. C. 607.)

LORD COLERIDGE, C. J.[4] I am of opinion that this conviction must be quashed. The facts of the case are these: The prisoner and some other persons who had been drinking in a public house were turned out of it at about 11 p. m. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone, and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether, under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone, coupled with the finding of the jury, will do? Now I think that is not enough. The indictment is framed under St. 24 & 25 Vict. c. 97, § 51. The act is an act relating to malicious injuries to property, and section 51 enacts that whosoever shall unlawfully and maliciously commit any damage, etc., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the fifty-eighth section, which deserves attention: "Every punishment and forfeiture by this act imposed on any person maliciously committing any offense, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offense shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me, on both these sections, that what was intended to be provided against by the act is the willfully doing an unlawful act, and that the act must be willfully and intentionally done on the part of the person doing it to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone

[3] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 1d.

[4] The statement of facts is omitted.

recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with, intending to strike them, and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited, and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offense created by an act in which the words are carefully studied.

BLACKBURN, J. I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes willful malice aforethought to bring a case within the common-law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding £5 shall be guilty of a misdemeanor. A person may be said to act maliciously when he willfully does an unlawful act without lawful excuse. The question here is, can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window? I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think, therefore, that the conviction must be quashed.

PIGOTT, B. I am of the same opinion.

LUSH, J. I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

CLEASBY, B., concurred.

Conviction quashed.

III. Constructive Intent [8]

COMMONWEALTH v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1873. 114 Mass. 323, 19 Am. Rep. 362.)

Complaint for assault and battery.

At the trial in the superior court, before Bacon, J., it appeared that the defendant was driving in a sleigh down Beacon street, and was approaching the intersection of Charles street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing he ran against and knocked down a boy who was crossing Beacon street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

ENDICOTT, J. We are of opinion that the ruling in this case cannot be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: That if the act the party was doing was merely malum prohibitum, he shall not be punishable for the act arising from misfortune or mistake; but if malum in se, it is otherwise. 1 Hale, P. C. 39; Foster, C. L. 259. Acts mala in se include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done willfully or corruptly. Acts mala prohibita include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev. § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not neces-

[8] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 17, 18.

sary to show that it was done willfully or corruptly. The ordinance declares a certain thing to be illegal. It therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. Rex v. Sainsbury, 4 T. R. 451, 457. It was held in Commonwealth v. Worcester, 3 Pick. 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See Commonwealth v. Farren, 9 Allen, 489; Commonwealth v. Waite, 11 Allen, 264, 87 Am. Dec. 711. It is therefore immaterial whether a party violates the ordinance willfully or not. The offense consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a new trial granted.

REGINA v. LATIMER.

(Court for Crown Cases Reserved, 1886. 16 Cox, C. C. 70.)

Case stated by the learned Recorder for the borough of Devonport as follows:

The prisoner was tried at the April Quarter Sessions for the borough of Devonport on the 10th day of April, 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public house in Devonport; that on Sunday, the 14th day of February, 1886, the prisoner, who was a soldier, and a man named Horace Chapple, were in the public house, and a quarrel took place, and eventually the prisoner was knocked down by the man, Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting, having in his hand his belt which he had taken off. As the prisoner passed he aimed a blow with his belt at the said Horace Chapple, and struck him slightly. The belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: (1) Was the blow struck at Chapple in self-defense to

get through the room, or unlawfully and maliciously? (2) Did the blow so struck in fact wound Ellen Rolston? (3) Was the striking of Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: (1) That the blow was unlawful and malicious. (2) That the blow did in fact wound Ellen Rolston. (3) That the striking of Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment, and admitted the prisoner to bail, to come up for judgment at the next sessions.

The question for the consideration of the court was whether upon the facts and the findings of the jury, the prisoner was rightly convicted of the offense for which he was indicted.

By St. 24 & 25 Vict. c. 100, § 20, it is enacted that:

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanor."

Croft, for the prisoner. The findings of the jury amount to a verdict of not guilty, for, though they found that the blow was unlawful and malicious, and did in fact wound the prosecutrix, they negatived those findings by the finding that the blow was accidental. In Reg. v. Pembliton, 12 Cox, C. C. 607, 30 L. T. Rep. (N. S.) 405, L. R. 2 Cr. Cas. Res. 119, it was held that a jury, by finding that a stone had been thrown by the prisoner, intending to strike a person with whom he had been fighting, and not intending to break a window as he had done, had negatived the existence of malice, either actual or constructive, and a conviction for malicious injury to property was upon that ground quashed. [MANISTY, J. Suppose here the prisoner had killed Ellen Rolston, would not he have been guilty of manslaughter?] Yes; but in this case the indictment is under a statute which requires that the blow should have been given maliciously, and intention to wound the particular person is therefore necessary. [Lord ESHER. The indictment does not charge any specific intent. It charges that he did it unlawfully. He was doing a criminal and unlawful act, which resulted in a wounding of Ellen Rolston. Was not that an unlawful wounding?] No; in the case cited the words in the statute were the same, and it was held not to be an unlawful injury. [FIELD, J. There the indictment was that the prisoner unlawfully and maliciously injured the window of A., and the jury found that he intended to wound B., and no doubt the court would hold that the evidence did not support the indictment.] In Reg. v. Faulkner, 13 Cox, C. C. 550, a sailor entered a part of a vessel for the purpose of stealing rum, and accidentally fired the vessel, but he was nevertheless held not guilty of arson. [MANISTY, J. In that case there was no evidence at all of malice.] I

submit that the unlawfulness of the act was sufficient evidence of malice there. In McPherson v. Daniels, 10 B. & C. 263, 2 M. & R. 251, "maliciously" has been defined as the doing a wrongful act willfully. [Lord COLERIDGE, C. J. Is not this case governed by the decision in Reg. v. Hunt, 1 Moo. C. C. 93?] No; for that case is inconsistent with the later case of Reg. v. Hewlett, 1 F. & F. 91, where it was held that where a person strikes A., and B., interposing, receives the blow, a conviction for wounding B. with intent to do grievous bodily harm cannot be sustained. I submit that this case is governed by the decision in Reg. v. Pembliton, and that, the jury having negatived the existence of malice, the prisoner is entitled to an acquittal.

Helpman, for the prosecution, was not called upon.

Lord COLERIDGE, C. J.[6] I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice, and is guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were res integra; but it is not res integra, because in Reg. v. Hunt a man, in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of Reg. v. Pembliton. But I observe that, in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by St. 24 & 25 Vict. c. 100, § 18, it is enacted that "whosoever shall unlawfully and maliciously by any means whatsoever wound * * * any person * * * with intent * * * to maim, disfigure, or disable any person * * * shall be guilty of felony"; and then section 20 enacts that "whosoever shall unlawfully and maliciously wound * * * any other person shall be guilty of a misdemeanor," and be liable to certain punishments. Therefore the language of the eighteenth and twentieth sections are perfectly different; and it must be remembered that this is a conviction for an offense under the twentieth section. Now, the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute (St.

[6] The opinions of Lord Esher, M. R., Bowen, L. J., and Field and Manisty, JJ., are omitted.

9 Geo. IV, c. 31), where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I cannot see that there could be any question, but for the case of Reg. v. Pembliton. Now, I think that that case was properly decided, but upon a ground which renders it clearly distinguishable from the present case; that is to say, the statute which was under discussion in Reg. v. Pembliton makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offense to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.

IV. Intent in Cases of Negligence[7]

STATE v. O'BRIEN.

(Supreme Court of New Jersey, 1867. 32 N. J. Law, 169.)

DALRIMPLE, J. On the 15th day of November, 1865, the defendant was a switch tender in the employ of the New Jersey Railroad & Transportation Company. His duty was to adjust, and keep adjusted, the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter, and convicted upon trial in the Essex oyer and terminer. He insisted, and in different forms asked the court to charge the jury, that he could not legally be convicted unless his will concurred in his omission of duty. The court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this

[7] For discussion of principles, see Clark on Criminal Law (3d Ed.) § 19.

court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge as requested.

The indictment was for the crime of manslaughter. If the defendant's omission of duty was willful, or, in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, whether by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offense of manslaughter, it was not necessary that it should appear that the act of omission was willful or of purpose. The court was right in its refusal to charge, as requested.

The only other question is whether there is error in the charge delivered. The error complained of is that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Prof. Greenleaf, in the third volume of his work on Evidence (section 129), in treating of homicide, says: "It may be laid down that, where one by his negligence has contributed to the death of another, he is responsible. The caution which the law requires in all these cases is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton, in his Treatise on Criminal Law (page 382), says: "There are many cases in which death is the result of an occurrence in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible depends upon the inquiry whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions, so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge, in the respect complained of, was in accordance with them. It expressly states that it was a question of fact, for the jury to settle, whether the defendant was or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed in violation of public law. The defendant in this case omitted his duty under such circumstances as amounted to gross or culpable or criminal negligence. The court charged the jury that if the defendant, at the time of the accident, was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question, in fact, involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only

to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.

V. Concurrence of Act and Intent [a]

MILTON v. STATE.

(Supreme Court of Florida, 1898. 40 Fla. 251, 24 South. 60.)

MABRY, J.[b] * * * The following instruction given by the court to the jury was excepted to by defendant, viz.: "If you believe from all the testimony in this case that the defendant was informed that in a certain house an offense was being committed against the ordinances of the city of Tampa, and that the defendant was a policeman of the city of Tampa at the time, then it was his duty, and it was lawful, if not resisted, for him to go into said house for the purpose of preventing, or arresting those who might in his presence be guilty of a violation of the ordinances of said city; but if you believe from all the evidence in this case that he went to that house in good faith as an officer of the law to enforce the law, and after he got in there violated the law himself, then the law removes its sanction to such entry, and he becomes a trespasser from the beginning." This charge is not correct, and we find no authority to sustain it. The circuit judge must have failed to observe the distinction obtaining in the civil and criminal departments of the law in the application of the rule sought to be invoked in the charge. Mr. Bishop says (1 Crim. Law [8th Ed.] § 208): "In civil jurisprudence we have the rule that when a man does a thing by permission of law—not by license, but by permission of law—and, after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of this subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or the intent, yet not the two together." The cases cited, State v. Moore, 12 N. H. 42, and Commonwealth v. Tobin, 108 Mass. 426, 11 Am. Rep. 375, sustain the text. * * *

The judgment is reversed, and a new trial awarded.

[a] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 20.

[b] Part of the opinion is omitted.

Sept. 19th, 1924.

PERSONS CAPABLE OF COMMITTING CRIME, AND EXEMPTION FROM RESPONSIBILITY

I. Infancy [1]

GODFREY v. STATE.

(Supreme Court of Alabama, 1858. 31 Ala. 323, 70 Am. Dec. 494.)

WALKER, J.[2] The single point to be considered in this case is whether the charge of the court below to the jury was correct. An analysis of that charge shows that the jury were strictly instructed that the defendant, being between seven and fourteen years of age, was prima facie incapable of committing crime; that, to overturn the intendment in favor of his incapacity to commit crime, the jury must be convinced from the evidence beyond a reasonable doubt, after allowing due consideration to the fact that the accused was a negro and a slave, that he knew fully the nature of the act done and its consequences; and that he showed plainly intelligent design and malice in the execution of the act. This charge, after an anxious and careful examination of it, we cannot pronounce erroneous.

An infant, above seven, but under fourteen, years of age, is presumed not to have such knowledge and discretion as would make him accountable for a felony committed during that period. But, if that presumption is met by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability, the reason for allowing an immunity from punishment ceases, and with it the rule which grants such immunity ceases. There are many cases where children between those ages, being shown to have been cognizant of the criminal nature of the act done, have been punished under the criminal law. A girl, thirteen years of age, was executed for killing her mistress. Two boys, one nine, and the other ten years of age, were convicted of murder, because one of them hid himself, and the other hid the dead body, thus manifesting as was supposed, a consciousness of guilt and a discretion to discern between good and evil. A boy of eight years of age, who had malice, revenge, and cunning, was hanged for firing two barns. A boy ten years old, who

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 21, 22.

[2] The statement of facts is omitted.

showed a mischievous discretion, was convicted of murdering his bedfellow. 4 Bl. Com. 23, 24.

In the case of Rex v. Owen, 2 Car. & P. 236, it was referred to the jury to determine whether the act of a girl ten years old, alleged to constitute a larceny, was known by her to be wrong when it was done; and upon that question she was acquitted. It is said in Hale's Pleas of the Crown, p. 22, that one between the ages of seven and fourteen might be convicted of a capital offense, "if it appeared by strong and pregnant evidence and circumstances that he was perfectly conscious of the nature and malignity of the crime." In an American case the same principle is thus stated: "If it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted, and have judgment of death." State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592. In that case a negro boy, who was a slave, of eleven years, was convicted of murder; but a new trial was granted on account of an erroneous ruling as to the competency of a witness, and it does not appear what farther was done in the case.

In the case of State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404, a negro slave, of less than twelve years, was convicted of murder; and the report of the case informs us that the defendant was executed. In that case the court dissenting from the cautious statement of the law found in 1 Hale's Pleas of the Crown, p. 27, permitted a conviction upon confessions. In this case, although a confession was given in evidence, the facts proved established the guilt of the accused so clearly that it is fairly inferable that no importance was attached to it by the court or jury, and its effect is not noticed in the charge. The question whether a conviction could be had upon confessions does not arise, and we do not commit ourselves to the doctrine of the decision last above cited upon that point.

All the authorities concur in maintaining the correctness of the propositions of law involved in the charge. Bishop on Criminal Law, §§ 283, 284, 285; 1 Archbold's Crim. Pl. 3, 4, 5, and notes; 1 Russell on Crimes, 3, 4, 5; Roscoe's Crim. Ev. 942, 944; Wharton's Am. Crim. Law, 51; 1 Wheeler's Crim. Cases, 231–234. Reason, humanity, and the law alike required that the court should, in its charge, throw around the jury every guard and restriction necessary to prevent an improper conviction in such a case. This has been carefully done by the court in this case, and we are bound to pronounce a full approval of the charge.

The judgment of the city court is affirmed, and its sentence must be executed.

II. Insanity [8]

STATE v. KNIGHT.

(Supreme Judicial Court of Maine, 1901. 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373.)

WHITEHOUSE, J. In this case the respondent was indicted and tried for the murder of Mamie Small. It was not in controversy that the accused, if responsible for his act, was guilty of murder in the first degree; and the only issue raised in defense was the insanity of the defendant. The jury returned a verdict of "guilty of murder in the first degree," and the case comes to this court on exceptions taken by the defendant to the refusal of the presiding justice to give certain instructions, and to the instructions actually given. * * *

It is not in controversy that the instructions actually given to the jury were in entire harmony with the intellectual test of criminal responsibility approved in State v. Lawrence, 57 Me. 574, and cases there cited, and that the refusal to give the requested instructions was fully justified by the doctrine of that case. But it is earnestly contended by the learned counsel for the defendant that an uncontrollable insane impulse to commit a criminal act may coexist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime, afforded by the knowledge of right and wrong respecting the act committed, has proved to be insufficient and unsatisfactory. It is accordingly insisted that the time has now arrived when this criterion of responsibility can be safely modified by incorporating into the rule the element of irresistible impulse presented in the defendant's requests.

It is undoubtedly true that in the progressive development of the medical jurisprudence of insanity more enlightened views have gradually prevailed respecting the functional activity of the mind, and the course of symptoms indicating mental disease, and that just conclusions have more frequently been reached by courts and juries in recent years in regard to the relation of insanity to criminal responsibility. But since the announcement of the decision by this court in State v. Lawrence, supra, in the year 1870, this abstruse and difficult question has been the subject of exhaustive re-examination and renewed study, in the light of all modern discoveries of scientific

[8] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 23–27.

truth bearing upon it by the most eminent medical and legal jurists in this country and England, and by courts of the highest authority in both countries; and it is still held by an overwhelming weight of judicial authority that, when the insanity of the accused is pleaded in defense, the test of his responsibility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it, is the only proper legal criterion, and that when fully developed and explained to the jury, in its application to the special facts and circumstances of different cases, it will always be found adequate to meet the demands of justice and humanity towards the accused, as well as to insure the protection and safety of the public.

In Browne's Medical Jurisprudence of Insanity, published in England in 1875 and republished in this country, the author critically analyzes the famous answers given by the English judges to the questions proposed to them by the House of Lords after the trial of McNaghten in 1843 (sections 10–14), which have formed the basis of the prevailing rule since that time, and the one approved in State v. Lawrence, supra, and then proceeds as follows (section 15): "After the fullest examination of the medical opinions on the other side, we are constrained to hold that the answers of the judges are a most satisfactory statement of the law, and that no better test of responsibility could, at the present time, be devised than that which makes knowledge of right and wrong at the time of the commission of the act the means of judging of the punishability of the person who has committed a criminal offense. 'Although not a test of insanity,' says Dr. Hammond, 'the knowledge of right and wrong is a test of responsibility. * * * Any individual having the capacity to know that an act which he contemplates is contrary to law should be deemed legally responsible and should suffer punishment. He possesses what is called by Bain punishability. * * * The only forms of insanity which in my opinion should absolve from responsibility * * * are such a degree of idiocy, dementia, or mania as prevents the individual from understanding the consequences of his act, and the existence of a delusion in regard to a matter of fact which, if true, would justify his act.' "

In the elaborate work on Medical Jurisprudence by Witthaus & Becker, published in New York in 1896, is a treatise on the Medical Aspects of Insanity in Its Relations to Medical Jurisprudence, by Dr. Fisher of New York. In that portion of the treatise devoted to Impulsive Insanity the author says (volume 3, p. 273): * * *

"All forms of crime may be committed under the influence of irresistible impulse—homicide, suicide, arson, theft, and various acts indicative of sexual perversion. We may also have melancholia or

mania associated with this condition, and more rarely delusions and hallucinations. It is not, however, in these latter conditions that we should consider this disease as an entity. In fact, the only safe course is to follow the dictum of the law in this respect, which virtually says that irresistible impulse is no defense unless a symptom of insanity."

Again, in the treatise on Mental Unsoundness in Its Legal Relation, in the same volume, by Mr. Becker, the author says, on pages 421, 422: "But evidence of the loss of control of the will, or of morbid impulse, does not constitute a defense, except when it demonstrates mental unsoundness of such a character as to destroy the power of distinguishing right and wrong as to the particular act. * * * This rule is the legal essence of the whole matter, and it avoids much of the confusion which the German jurists and metaphysicians have infused into this subject." * * *

In the Medical Jurisprudence of Insanity or Forensic Psychiatry, by Dr. S. V. Clevenger, of Chicago, published in 1898, the author concedes that the test of right and wrong as to the particular act charged is generally accepted in the United States in determining the question of responsibility for crime (volume 2, p. 18), and abundantly justifies the concession by a vast array of "Legal Adjudications in Criminal Cases" cited in chapter 7 of the same volume. * * *

In a very elaborate discussion of the subject by the Supreme Court of Appeals in State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224 (1892), the authorities are critically examined and compared, and the doctrine of "irresistible impulse" emphatically repudiated. In the opinion it is said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse, and not criminal design and guilt? * * * I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment, and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impluse is born of the disease, and, when it exists, capacity to know the nature of the act is gone. This is the sense in which 'irresistible impulse' was defined in Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231, and Dacey v. People, 116 Ill. 556, 6 N. E. 165." See, also, State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88; State v. Nixon, 32 Kan. 205, 4 Pac. 159; Ortwein v. Commonwealth, 76 Pa. 414, 18 Am. Rep. 420; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Guiteau's Case (D. C.) 10 Fed. 195. * * *

It is evident that much of the diversity of opinion or difference in modes of expression upon this subject arises from a failure to discriminate between that "irresistible impulse" produced by an insane delusion or mental disease which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act he is committing, and that uncontrollable impulse which is alleged to arise from mental disease and to coexist with the capacity to comprehend the nature and wrongfulness of the act, but which may with equal reason and consistency be attributable to moral depravity and criminal perversity.

In the case at bar it has been seen that the defendant's requests do not assume the existence of an insane delusion or any mental disease sufficient to override his reason and judgment, obliterate his sense of right and wrong, and deprive him of the power to choose between them. On the contrary, they presuppose "sufficient mental capacity and reason to enable him to distinguish between right and wrong as to the particular act," and still declare him irresponsible if, by reason of mental disease, he did not have "sufficient will power to refrain from committing the act."

It is contended, in behalf of the state, that the requests present a contradictory and impossible state of mind, in thus assuming that the accused may have no insane delusions as to the act he is committing, and have full capacity and mental power to comprehend the nature and consequences of the act, to know that it was unlawful and wrong and would subject him to punishment, and yet have no power to refrain from committing it. But, whatever may eventually be declared by the great body of medical jurists to be the psychological truth in regard to the coexistence of uncontrollable impulse and such full capacity to distinguish right from wrong in regard to the act in question, at present, without clear and conclusive proof that such a state of mind may exist, and in the absence of any satisfactory test for the discovery of its existence that would be universally applicable in the practicable administration of the criminal law, this court must adhere to the rule approved in State v. Lawrence, supra, which as construed and applied in this state, has proved to be an adequate and satisfactory criterion for determining the punishability of the accused when a plea of insanity is interposed in defense. * * *

Exceptions overruled. Judgment for the state.

STATE v. JONES.

(Supreme Judicial Court of New Hampshire, 1871. 50 N. H. 369, 9 Am. Rep. 242.)

Indictment against Hiram Jones for the murder of his wife. The defendant was found guilty of murder in the first degree. * * *

LADD, J.[4] * * * The remaining and most important questions in the case arise upon the instructions given by the court to the jury, and the refusal to give instructions requested by defendant's counsel.

When, as in this case, a person charged with crime admits the act, but sets up the defense of insanity, the real ultimate question to be determined seems to be whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent.

In solving that problem, as in all other cases, it is for the court to find the law, and for the jury to find the fact. The main question for our consideration here is, what part of this difficult inquiry is law, and what part fact?

It will be readily agreed, as said by Shaw, C. J., in Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, that if the reason and mental powers of the accused are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible agent, and, of course, is not punishable for acts which otherwise would be criminal.

But experience and observation show that, in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will, the conscience, and mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud, the whole mind; or it may destroy, or only impair, the functions of one or more faculties of the mind. There seem to be cases where, as Erskine said in Hadfield's Case, reason is not driven from her seat, but where distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.

The term "partial insanity" has been applied to such cases by writers and judges, from Lord Hale to Chief Justice Shaw, where, as has been said, "the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging"; and it is here that the difficulty of the subject begins, and that confusion and contradic-

[4] The statement of facts and part of the opinion are omitted.

tion in the authorities make their appearance. "No one can say where twilight ends or begins, but there is ample distinction between night and day." We are to inquire whether a universal test has been found wherewith to determine, in all cases, the line between criminal accountability and nonaccountability—between the region of crime and innocence—in those cases which lie neither wholly in the darkness of night nor the light of day. If such a test exists, or if one can be found, it is of the utmost importance that it be clearly defined and broadly laid down, so that when it is given to a jury it may aid, rather than confuse, them. To ascertain whether a rule has hitherto been found, we must look to the authorities; and so far as we have been able to examine them the leading and familiar English cases and authorities are substantially as follows: [The learned judge here reviewed the English authorities previous to McNaghten's Case, and proceeded.]

The numerical preponderance of authority in England, as gathered from the cases thus far, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test, although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views or the exigencies of particular cases, and especially by the charge of Lord Denman in Regina v. Oxford. * * *

The very first step in the inquiry to ascertain if there be any test or criterion that may be safely given to the jury on this subject whether as a fact universally true or as a principle of law, involves the examination of an immense mass of evidence as complicated and difficult to understand as can well be conceived. Moreover, it would require a degree of skill and scientific attainment which could only be reached by years of special study and intelligent observation. Not only ought all the facts bearing on the question to be collected from every asylum for the insane throughout the world, but, as an inflexible rule is to be established, the facts of all other cases where the patient has never received scientific treatment ought to be added to the stock. Then, after collecting the facts in this way, it would be necessary to compare cases and classes of cases one with the other, to weigh facts against facts, to balance theories and opinions, and finally to deduce a result which might itself turn out to be nothing more than a theory or opinion after all. At any rate, it would be a deduction of fact.

It need not be said that this is not the business of a court of law. It is a work which can only be reasonably well done by men who devote their lives exclusively to its accomplishment. Such a work has doubtless been done, with extraordinary patience and ability, by our distinguished countryman, Dr. Ray; and the result of his laborious investigation is that no test can be found. He says: "To persons

practically acquainted with the insane mind, it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulse, but deliberately and shrewdly." Ray's Med. Jurisp. Ins. § 43.

If we were at liberty to weigh and consider evidence upon the question, it is clear that such testimony must outweigh all the convenient formulas and arbitrary dogmas laid down by lawyers and judges from the time of Lord Hale to the present, simply for the reason that Dr. Ray is qualified by study and observation to give an opinion, while lawyers and judges are not. But we do not consider evidence upon this point at all. Whether there is any universal test is as clearly a pure matter of fact, as is the question what that test may be. * * *

In view of these considerations, we are led to the conclusion that the instruction given to the jury in this case, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant," was right; that it fully covers the only general, universal element of law involved in the inquiry; and, therefore, that any further step in the direction indicated by the requests would have been an interference with the province of the jury, and the enunciation of a proposition which in its essence is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because, for aught we can know, it might have been false in fact.

This would seem to dispose of the whole case. All the other instructions given are only the direct logical consequence of this principle.

Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be approached. Enough has already been said as to the use of symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity. If it was, a criminal intent did not produce it. If it was not, a criminal intent did produce it, and it was crime.

The instructions as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental dis-

ease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime. * * *

Exceptions overruled.

III. Drunkenness [5]

STATE v. HAAB.

(Supreme Court of Louisiana, 1901. 105 La. 230, 29 South. 725.)

NICHOLLS, C. J.[6] In this case, defendant, Fred. H. Haab, indicted for murder, convicted of manslaughter, and sentenced to imprisonment for six years at hard labor in the penitentiary, has appealed from the sentence rendered, upon a number of grounds embodied in bills of exception and assignment of error, which we have examined with great care. * * *

We think that the evidence disclosed that for some time previous to the homicide, at the time of the homicide, and up to the time of his arrest, the accused had been continually drinking heavily and getting drunk; that he was drunk at the time of the homicide. It is claimed for the defense that during this whole period the condition of his mind was such as to render him unable to distinguish right from wrong, and that his long continuance in excessive drinking had brought him into such a condition that he was unable to resist drinking and getting drunk; that his condition of mind was such as to give rise to delusions on his part that he was about to be attacked and killed.

It is claimed that during this long debauch he had delirium tremens, also at some time prior to the homicide. It is claimed that there was evidence to show that he was in fact crazy or insane at the time of the homicide, and that, though this was the result of heavy drinking, the accused was, nevertheless, excusable for the homicide. * * *

In his reasons for refusing a new trial the judge said:

"The accused began drinking immoderately, and was under the influence of liquor to a greater or less degree continually and without intermission for two weeks before the homicide, until its effects wore off, after his arrest and incarceration, when he ceased drinking. It makes no difference by what terms you designate the temporary effects of his excesses, whether called an ordinary drunk, drunk to

[5] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 28, 29.

[6] Part of the opinion is omitted.

stupefaction, delirium tremens, drunk to frenzy, insanity, etc., if it were the immediate product of this particular debauch, he is responsible for his acts under its influence. There was no evidence whatever that Haab's condition was a remote consequence of long-continued prior excesses, nor that he had ever been in this condition before. In the opinion of the court, at the time of the firing of the fatal shot Haab was not suffering from delirium tremens. He was merely afflicted with that nervousness that always accompanies immoderate indulgence in liquor."

We have referred to United States v. Drew, cited by counsel, and reported in 5 Mason, 29, Fed. Cas. No. 14,993. The accused upon an admitted state of facts was declared insane and discharged. In the course of his opinion in the case, Judge Story used the following language:

"In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a state of intoxication; the law not permitting a man to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take and be the immediate result of a fit of intoxication, and while it lasts, and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while defendant was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate and not to the remote cause—to the actual state of the party, and not to the causes which remotely caused it.

"Many species of insanity arise remotely from what, in a moral view, is a criminal negligence or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such immunity has always been deemed a sufficient excuse for any crime done under its influence."

We think it fairly appears from the recitals of the accused and those of the judge that the accused was in a state of intoxication at the time of the homicide, and that his mental condition at that time, whatever it might be, was the immediate and direct result, and not the remote result, of voluntary drunkenness. When we say direct and immediate result, we mean to say that it arose during a condition of drunkenness and pending a single, continuing, voluntary, drunken

debauch, which at its origin started with the accused in a condition of sanity. The results were in a legal sense immediate and direct results, though the beginning of the drunken debauch may have dated some days back, or even some weeks before the homicide.

We think, under the recitals in the case, that it is precisely such a one as Mr. Justice Story refers to in which he says: "Insanity, or a condition of mind substantially that of insanity, would not serve as a shelter or a protection against crime."

We think that this was the view taken by the district judge of the fact and law of the case, a view which he endeavored to place before the jury in his charge. We think he fairly advised the jury as to the law, though there were some expressions in his charge which he might well have omitted, as they doubtless did not instruct, and may perhaps have to some extent confused, the jury. We do not think, however, they were led into error or misled by these expressions, or that they were prejudicial. It is well for a judge, charging a jury as to insanity, to avoid as far as possible the use of technical medical terms as to the various forms and shades of mental disease.

They are not likely to enlighten or impress the jury, and are very liable to technical objections.

We do not think there is any ground for the reversal of the judgment, and it is hereby affirmed.

Rehearing refused.

WHITTEN v. STATE.

(Supreme Court of Alabama, 1896. 115 Ala. 72, 22 South. 483.)

COLEMAN, J.[1] The defendant was indicted and convicted for an assault with intent forcibly to ravish. There was evidence introduced on the trial to show that at the time of the misconduct of the defendant he was sober, and there was evidence tending to show that he was drunk. On this phase of the evidence the defendant requested the court to give the following charge: "The presumption in this case is that the defendant is innocent until the state has proven beyond all reasonable doubt that he is guilty; and if the jury have a reasonable doubt, growing out of all the evidence, as to whether he was sufficiently sober to form the specific intent to ravish, then the jury cannot find the defendant guilty of an assault with intent to ravish." This charge was refused. We are of opinion the charge should have been given. In order to convict under the statute for an assault with intent to ravish, it is necessary to satisfy the jury beyond a reasonable doubt that the defendant entertained the specific intent charged and made the

[1] Part of the opinion is omitted.

assault to accomplish the specific purpose. Mere drunkenness does not excuse or palliate an offense, but it may produce a state of mind which incapacitates the party from forming or entertaining a specific intent. If the mental condition is such that a specific intent cannot be formed, whether this condition is caused by drunkenness or otherwise, a party cannot be said to have committed an offense a necessary element of which is that it be done with a specific intent. * * *

The condition of the defendant's mind arising from his voluntary drunkenness was no excuse for the assault, an offense included in that charged. It can only be considered upon the question of his guilt of the statutory offense for which he was indicted, to wit, an assault with intent to forcibly ravish, which involves the condition of the defendant's mind. Engelhardt v. State, 88 Ala. 100, 7 South. 154.

Reversed and remanded.

IV. Corporations [8]

UNITED STATES v. JOHN KELSO COMPANY.

(United States District Court for California, 1898. 86 Fed. 304.)

DE HAVEN, District Judge.[9] On October 9, 1897, there was filed in this court by the United States district attorney for this district an information charging the defendant, a corporation, with the violation of "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (27 Stat. 340, c. 352 [U. S. Comp. St. 1913, §§ 8918–8920]; 2 Supp. Rev. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney, directed that a summons in the general form prescribed by section 1390 of the Penal Code of this state, be served upon said corporation, and accordingly on said date a summons was issued, directing the defendant to appear before the judge of said court in the courtroom of the United States District Court for this district on the 21st day of October, 1897, to answer the charge contained in the information. The summons stated generally the nature of the charge, and for a more complete statement of such offense referred to the information on file. On the day named in said summons for its appearance, the defendant corporation

[8] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 80-32.

[9] Part of the opinion is omitted.

appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion it was claimed in behalf of the defendant: First, that the act of Congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of entertaining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, Congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer, attacking the information on the ground of an alleged failure to charge the defendant with the commission of a public offense. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the act of Congress above referred to is applicable to a corporation, and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or subcontractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." And section 2 of the act provides "that * * * any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States * * * who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or

mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of State v. Manufacturing Co., 20 Me. 41, 37 Am. Dec. 38, supports the proposition that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act, and it must be conceded there are to be found dicta in many other cases to the same effect. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better-considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. State v. Railroad Co., 23 N. J. Law, 360; Reg. v. Great North of England Ry. Co., 58 E. C. L. 315; Commonwealth v. Proprietors, 2 Gray (Mass.) 339. See, also, State v. Railway Co., 15 W. Va. 380; 36 Am. Rep. 803. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus an action for malicious prosecuton will lie against a banking corporation. Reed v. Bank, 130 Mass. 443, 39 Am. Rep. 468; Goodspeed v. Bank, 22 Conn. 530, 58 Am. Dec. 439. An action will lie also against a corporation for a malicious libel. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73; Maynard v. Insurance Co., 34 Cal. 48, 91 Am. Dec. 672. The opinion in the latter case, delivered by Currey, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, in the course of which that learned judge, in answer to the contention that corporations are mere legal entities, existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said:

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do, within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to

prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation—as, for instance, a fine. In the act of Congress now under consideration it is made an offense for any contractor or subcontractor, whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate the provision of this law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit, of this statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law should receive the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to Congress, unless its language will admit of no other interpretation. * * *

The motion of the defendant will be denied.

V. Ignorance or Mistake of Law [10]

STATE v. BOYETT.

(Supreme Court of North Carolina, 1849. 32 N. C. 336.)

PEARSON, J.[11] "Ignorantia legis neminem excusat." Every one competent to act for himself is presumed to know the law. No one is allowed to excuse himself by pleading ignorance. Courts are compelled to act upon this rule, as well in criminal as civil matters. It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial, by conflicting evidence upon the question of ignorance.

In civil matters, it is admitted, the presumption is frequently not in accordance with the truth. The rules of property are complicated systems—the result, "not of the reason of any one man, but of many men put together"; hence they are not often understood, and more frequently not properly applied, and the presumption can only be justified upon the ground of necessity. But in criminal matters the presumption most usually accords with the truth. As to such as are mala in se, every one has an innate sense of right and wrong, which enables him to know when he violates the law, and it is of no consequence if he be not able to give the name by which the offense is known in the lawbooks, or to point out the nice distinctions between the different grades of offense. As to such as are "mala prohibita," they depend upon the statutes printed and published and put within the reach of every one; so that no one has a right to complain if a presumption, necessary to the administration of the law, is applied to him. To allow ignorance as an excuse would be to offer a reward to the ignorant.

The defendant voted, when he was not entitled by law to vote. He is presumed to know the law. Hence he voted, knowing that he had no right, and, acting with this knowledge, he necessarily committed a fraud upon the public—in the words of the act, he knowingly and fraudulently voted when he was not entitled to vote. It being proved on the part of the state that he voted, not having resided within the bounds of the company for six months next preceding the election, a case was made out against him.

[10] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 33, 34.

[11] The statement of facts is omitted.

He offered to prove, for the purpose of rebutting the inference of fraud, that he had stated the facts to a respectable gentleman, who advised him he had a right to vote. His honor held the testimony inadmissible. We concur in that opinion.

The evidence had no tendency to rebut the inference of fraud, for the inference was made from his presumed knowledge of the law, and that presumption could not be met by any such proof, without introducing all the evils which the rule was intended to avoid. The question, in effect, was: Shall a man be allowed, in excuse of a violation of the law, to prove that he was ignorant of the very law under which he professed to act, and under which he claimed the privilege of voting? If he was not ignorant of the law, and that he cannot be heard to allege, then he voted knowingly, and, by necessary inference, fraudulently.

An indictment for extortion charges that the defendant received the fee "unlawfully, corruptly, deceitfully, and extorsively." This averment the state must prove. It is done by showing that the defendant received what the law does not allow him to take; for the presumption is "he knew the law upon the subject of fees to be taken by himself," and the inference from such knowledge is that he acted "corruptly and deceitfully" (words quite as strong as knowingly and fraudulently), unless it is shown that he did so by some inadvertence or mistake in calculation. He cannot excuse himself for taking more than the legal fee by saying that he was misled by the advice of an attorney. If such, or like, excuses were admitted, it would hardly ever be possible to convict. He might always contrive to ground his conduct upon misapprehension or improper advice. State v. Dickens, 2 N. C. 406. It would be a different question if the defendant had stated the facts to the judges of the election, and they had decided in favor of his right to vote; for their decision would rebut the presumption of knowledge on his part in a manner contemplated by law.

The case was ably argued for the defendant. It was insisted that it was necessary for the state to aver and prove that the defendant voted knowingly and fraudulently. That position is admitted. The reply is the averment was made and was proved; for proof being made that he voted when he was not entitled to vote, the presumption is that he knew the law, and fraud is the necessary inference, as corruption and deceit were in the case above cited. It cannot be contended that, to fix him with knowledge, the state must show that some one read and explained the law to him; or, to fix him with fraud, that it must be proven he had been bribed. If so, the statute is a dead letter. Our attention was called to the fact that the act of 1844 (Laws 1844–45, p. 67, c. 43), making the offense indictable, uses the words, "knowingly and fraudulently," which words are not used in the act of 1777, imposing a penalty. To incur the penalty under the act of 1777, the voting must be unlawful, and it must be done

knowingly and fraudulently, in the sense above explained. If one, having a deed for 50 acres of land, votes in the Senate, and it turns out that the deed only contains 49 acres, the penalty is not incurred, unless he knew the fact at the time he voted. So, if one votes for a constable, and it turns out that the dividing line includes him in another company, there is not in either case that criminal intent which is a necessary ingredient of the offense, whether it be punished by a penalty or by indictment. The act of 1844 expresses in so many words what the law would have implied. It is a strained inference that by so doing the Legislature intended to make the case of illegal voting an "exception," and to take it out of the rule "ignorantia legis," a rule which has always been acted upon in our law, and in the laws of every nation of which we have any knowledge, and without which, in fact, the law cannot be administered. The inference sought to be made results in this: The Legislature did not intend the act of 1844 to be carried into effect. It was intended to be "brutum fulmen." No reason has been suggested for making an exception in this case. The only additional qualification to that of a voter for a member of the House of Commons is a residence of six months in the captain's company.

This is not complicated or difficult to be understood. Why make the exception, and offer a reward for ignorance in this particular case? Such a construction cannot be admitted, unless the lawmakers had declared their intention by positive enactment.

PER CURIAM. There is no error in the court below, and the same must be so certified.

CUTTER v. STATE.

(Supreme Court of New Jersey, 1873. 36 N. J. Law, 125.)

The opinion of the court was delivered by BEASLEY, C. J.[12] The defendant was indicted for extortion in taking fees to which he was not entitled, on a criminal complaint before him as a justice of the peace. The defense which he set up, and which was overruled, was that he had taken these moneys innocently, and under a belief that by force of the statute he had a right to exact them.

This subject is regulated by the twenty-eighth section of the act for the punishment of crimes. Nix. Dig. 197. This clause declares that no justice or other officer of this state shall receive or take any fee or reward to execute and do his duty and office but such as is or shall be allowed by the laws of this state, and that "if any justice, etc., shall receive or take, by color of his office any fee or reward

[12] Part of the opinion is omitted.

whatsoever, not allowed by the laws of this state, for doing his office, and be thereof convicted, he shall be punished," etc. * * *

If the magistrate received the fees in question without any corrupt intent, and under the conviction that they were lawfully his due, I do not think such an act was a crime by force of the statute above cited.

But it is argued on the part of the prosecution that as the fees to which the justice was entitled are fixed by law, and as he cannot set up as an excuse for his conduct his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, "Ignorantia legis neminem excusat." But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is malum in se, or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary contituent of the particular offense, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offense charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry as a fact to be found by the jury. This doctrine has often been applied to the offense of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defense if he can show in a satisfactory manner that, being under a misapprehension as to his legal rights, he honestly believed the articles in question to be his own. Rex v. Hall, 3 Car. & P. 409; Reg. v. Reed, Car. & M. 306.

The adjudications show many other applications of the same principle, and the facts of some of such cases were not substantially dissimilar from those embraced in the present inquiry. In the case of People v. Whaley, 6 Cow. (N. Y.) 661, a justice of the peace had been indicted for taking illegal fees, and the court held that the motives of the defendant, whether they showed corruption or that he acted through a mistake of the law, were a proper question for a jury. The case of Commonwealth v. Shed, 1 Mass, 228, was put before the jury on the same ground. This was likewise the ground of decision in the case of Commonwealth v. Bradford, 9 Metc. (Mass.) 268; the charge being for illegal voting, and it being declared that

evidence that the defendant had consulted counsel as to his right of suffrage and had acted on the advice thus obtained was admissible in his favor. This evidence was only important to show that the defendant, in infringing the statute, had done so in ignorance of the rule of law upon the subject. Many other cases resting on the same basis might be cited; but the foregoing are sufficient to mark clearly the boundaries delineated by the courts to the general rule that ignorance of law is no defense when the mandates of a statute have been disregarded or a crime has been perpetrated. That the present case falls within the exceptions to this general rule appears to me to be plain. There can be no doubt that an opinion very generally prevailed that magistrates had the right to exact the fees which were received by this defendant and that they could be legally taken under similar circumstances. The prevalence of such an opinion could not, it is true, legalize the act of taking such fees; but its existence might tend to show that the defendant, when he did the act with which he stands charged, was not conscious of doing anything wrong.

If a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, it would seem palpably unjust, and therefore inconsistent with the ordinary grounds of judicial action, to hold such conduct criminal if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it. I think the defendant had the right in this case to prove to the jury that the moneys, which it is charged he took extorsively, were received by him under a mistake as to his legal rights, and that, as such evidence, being offered by him, was overruled, the judgment on that account must be reversed.

VI. Ignorance or Mistake of Fact—Common-Law Offenses [16]

STATE v. NASH.

(Supreme Court of North Carolina, 1883. 88 N. C. 618.)

Indictment for assault and battery, tried at the Fall term, 1882, of Richmond superior court, before Gilmer, J. * * *

The defendant was put upon the stand as a witness in his own behalf, admitted that he fired the gun at the crowd, and proposed to

[16] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 35.

prove that, before he fired, his child, who was sleeping near a window in the house, through which the noise of the bells and horns and firing was heard and the flash of the firing seen, rose up and ran to the witness with blood on her face (caused, as he afterwards learned, but did not then know, by her running against the end of a table), and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and, seeing the flash of pistols, fired, as he supposed, by the retreating crowd, fired his gun at and into the crowd. This evidence was objected to by the state and excluded by the court, and the defendant excepted.

The court instructed the jury that the defendant had not shown justification for the shooting. Verdict of guilty; judgment; appeal by the defendant.

ASHE, J.[14] The question presented by the record is, was there error in the refusal of the judge to receive the evidence offered by the defendant? We are of the opinion there was error in rejecting so much of the proposed testimony as tended to show, on the part of the defendant, a reasonable ground of belief that the trespassers upon his premises had fired into his house and wounded his child.

It may be, as testified by the prosecutor, that the band of young men who went to the defendant's house on the night in question only intended innocent amusement; but there is one unusual and rather extraordinary feature in the transaction—that the party intending a mere serenade should, on such an occasion, carry guns and pistols. They are certainly very unusual instruments of music in the hands even of a calithumpian band.

They entered the inclosure, 20 in number, and marched round the house, blowing horns, ringing bells, and firing guns and pistols, which must have greatly frightened the family and the defendant himself, unless he is a man of more than ordinary courage. But, whether awed or not by such a display of numbers and lawlessness, yielding to the dictates of prudence, he submitted to the humiliating indignity and remained within doors until his little daughter, as he proposed to show, ran to him with her face bleeding; and believing, as was natural under the circumstances, that she had been shot, he seized his gun and went to the door, saw the flash of firearms, shot into the crowd, and wounded the prosecutor. We must suppose it was all the work of an instant. Did the defendant, under these circumstances, have reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was continuing? If he had, then he ought to have been acquitted.

We know this has been a much mooted question, but upon an investigation of the authorities our conclusion is that a reasonable belief that a felony is in the act of being committed on one will excuse

[14] The statement of facts is abridged.

the killing of the supposed assailant, though no felony was in fact intended; and whatever will excuse homicide will, of course, excuse assault and battery.

In State v. Scott, 26 N. C. 409, 42 Am. Dec. 148, the court says: "In consultation it seemed to us at one time that the case might properly have been left to the jury, favorably to the prisoner, on the principle of Levet's Case, Cro. Car. 538, 1 Hale, 474, which is that if the prisoner had reasonable ground for believing that the deceased intended to kill him, and under that belief slew him, it would be excusable, or, at most, only manslaughter, though in truth the deceased had no such design at the time." It is to be noted that Levet was acquitted. But the court did not give the prisoner, in Scott's Case, the benefit of the principle, for the reason that no such instruction had been asked in the court below; the court concluding that the prisoner would have requested the instruction, if he had acted upon such belief, and there were, besides, other circumstances in the case which prevented the application of the principle. But it is clearly to be deduced from the opinion of Chief Justice Ruffin, who spoke for the court, that in a proper case the principle might be invoked to excuse a defendant. See, also, Patterson v. People, 46 Barb. (N. Y.) 627.

The same doctrine was enunciated by Parker, J., afterwards Chief Justice of the Supreme Court of Massachusetts, in the famous case of Commonwealth v. Selfridge, Self. Trial, 100, and the principle is thus illustrated: "A., in the peaceful pursuit of his affairs, sees B. walking towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the same instant the pistol is fired, and of the wound B. dies. It turned out that the pistol was in fact loaded with powder only, and that the real design of B. was only to terrify A." The judge inquired: "Will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Crim. Law, § 1026 (g), and note; Whar. Law of Homicide, 215 et seq.

But it may be objected that the defendant acted too rashly. Before he resorted to the use of his gun, he should have taken the precaution to ascertain the fact whether his child had been actually shot. But that doctrine is inconsistent with the principle we have announced. If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger really existed and was imminent. Taking, then, the fact to be that the trespassers had fired into the defendant's house and shot his child, and the firing continued, there was no time for delay. The occasion required prompt action. The next shot might strike him or some other member of his family.

Under these circumstances the law would justify the defendant in firing upon his assailants in defense of himself and his family.

But, as we have said, the grounds of belief must be reasonable. The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief. And here the error is in the court's refusing to receive the proposed evidence, and submitting that question to the consideration of the jury. A venire de novo must be awarded.

SMITH, C. J. (dissenting). I am unable to concur with the other members of the court in the conclusion reached that the testimony of the defendant in explanation of his conduct, if admitted and believed, would be a defense to the charge, or have any other legal effect than to mitigate his offense; and hence, as immaterial upon the issue and tending to mislead, there is no error in rejecting it.

The facts in connection with this proposed statement are summarily as follows: A boisterous and unruly crowd, in what seems to have been a frolic, enter the defendant's premises in the early night with bells, horns, and firearms, by the noise of which as they pass round his dwelling himself and his family are greatly annoyed and their peace disturbed. As they are about to leave, his little frightened daughter runs up to him with blood upon her face, caused by her striking against a table, but which he then supposed to proceed from a shot wound. Acting upon the impulse produced by this misconception, and without stopping to make inquiry as to the cause or extent of the inquiry [injury?], he seizes his gun, loaded with shot of large size, hastens to the door and out into the porch, and, seeing the flash of the gun, fires into the retreating body, then near the outer gate, some 35 yards distant, without a word of warning or remonstrance, and wounds one of the number in the leg.

This was, in my opinion, a hasty and unauthorized act in the use of a deadly weapon, not in defense of himself or family or premises, but the offspring of a spirit of retaliation for what he erroneously supposed to have been done, and whose error could have at once been corrected. If death had ensued, the circumstances would not have excused the homicide, and, as it was not fatal, it cannot be less than an assault.

Human life is too safely guarded by law to allow it to be put in peril upon such provocation, and, however much it may palliate the defendant's impulse and the rash act in which it resulted, it cannot, in my opinion, excuse his use of a deadly instrument in so reckless a manner.

PER CURIAM. Venire de novo.

VII. Same—Statutory Offenses [18]

STATE v. RIPPETH.

(Supreme Court of Ohio, 1904. 71 Ohio St. 85, 72 N. E. 298.)

One Rippeth was convicted of selling oleomargarine in imitation of butter, and on error the judgment of conviction was set aside in the circuit court, and the state brings error.

The defendant in error was charged, by affidavit filed with P. A. Garver, a justice of the peace in and for Franklin township, Tuscarawas county, with having unlawfully sold and delivered to one Martin Cowen oleomargarine to the amount of one pound, which oleomargarine then and there contained artificial (yellow) coloring matter, the name of which coloring matter was unknown to the affiant, contrary to statute in such case made and provided, etc. On this affidavit the defendant was put upon trial to a jury of 12 men. The purchaser of the said oleomargarine, Martin Cowen, is an inspector in the dairy and food department of the state of Ohio, and it appeared upon the trial that on the 17th day of January, 1901, the said Martin Cowen entered the grocery of the defendant in error, presented his card, which contained his name, address, and official capacity, then and there stating to said defendant in error that he was a state food inspector, and that he desired to see his oleomargarine. The defendant in error took said Cowen around his counter and showed him the oleomargarine, which was done up in pound packages. Cowen said to Rippeth, "I would like to have a pound of this oleomargarine for analysis," whereupon Rippeth said, "All right," and delivered the oleomargarine, and accepted the market price therefor. The same was taken to a chemist—Prof. Hobbs—and was analyzed by him, and proved to contain coloring matter. At the close of the testimony offered by the state the defendant made a motion to the justice to direct a verdict in his behalf. The court overruled this motion, and, no evidence being offered by the defense, the case was argued by counsel, and after a charge by the court was submitted to the jury, who returned a verdict of guilty. Motion to set aside the verdict was filed by the defendant, and overruled by the justice. A bill of exceptions was prepared, signed, and allowed, and proceedings in error prosecuted in the court of common pleas, where the judgment of the justice of the peace was affirmed. On petition in error in the circuit court the judgment of the court of common pleas was reversed, and this proceeding in error is prosecuted to reverse the judg-

[18] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 36.

ment of the circuit court and affirm the judgment of the court of common pleas.

PER CURIAM. Section 4200-16, Bates' Ann. St., makes it a penal offense for any person to "sell or deliver" any oleomargarine which contains coloring matter. This is a police regulation, imposing a penalty irrespective of criminal intent; and it contains no exception in favor of any person, nor as to whom the prohibited article may be sold or delivered, nor for what purpose. The dealer in the adulterated article has it in his possession for sale, and sells or delivers the same at his peril. He cannot shield himself by the plea of ignorance in regard to its character, nor by the plea that he made the sale for analysis, or for any other purpose. State v. Kelly, 54 Ohio St. 166, 43 N. E. 163; State v. Hutchinson, 56 Ohio St. 82, 46 N. E. 71.

Judgment of the circuit court reversed, and judgment of the court of common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur. CREW, J., dissents.[16]

VIII. Justification—Duress [17]

RESPUBLICA v. McCARTY.

(Supreme Court of Pennsylvania, 1781. 2 Dall. 86, 1 L. Ed. 300.)

The defendant was indicted for high treason, in levying war, etc., by joining the armies of the king of Great Britain. * * *

McKEAN, C. J.[18] The crime imputed to the defendant by the indictment is that of levying war, by joining the armies of the king of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession it appears that he actually enlisted in a corps belonging to the enemy; but it also appears that he had previously been taken prisoner by them and confined at Wilmington. He remained, however, with the British troops for 10 or 11 months, during which he might easily have accomplished his escape; and it must be remembered that, in the eye of the law, nothing will excuse the act of joining an enemy but the fear of immediate death—not the fear of any inferior personal injury, nor the apprehension of any outrage upon prop-

[16] The dissenting opinion of Crew, J., is omitted.

[17] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 39.

[18] Part of this case is omitted.

erty. But, had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period. * * *

Verdict—Not guilty.

RIGGS v. STATE.

(Supreme Court of Tennessee, 1866. 8 Cold. 85, 91 Am. Dec. 272.)

The plaintiff in error was convicted at the August term, 1866, of murder in the second degree, and sentenced to 15 years' imprisonment in the penitentiary, from which he appealed. Judge James P. Swan, presiding.

SHACKELFORD, J.,[19] delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Jefferson county for the killing of Capt. Thornhill. A change of venue was had to the county of Grainger. At August term, 1866, of the circuit court of Grainger county, he was convicted by a jury of murder in the second degree, and sentenced to 15 years' imprisonment in the penitentiary.

A new trial was moved for, which was overruled, and an appeal taken to this court.

The court, among other things not excepted to, charged the jury in substance as follows: "A soldier in the service of the United States is bound to obey all lawful orders of his superior officers, or officers over him, and all he may do in obeying such lawful orders constitutes no offense as to him. But an order, illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal, so that a man of ordinary sense and understanding would know, as soon as he heard the order read or given, that such order was illegal, would afford a private no protection for a crime committed under such order, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same a crime in law. Any order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him. No person in the military service has any right to commit a crime in law, contrary to the rules and usages of war, and outside of the purposes thereof; and the officers are all amenable for all crimes thus committed, and the privates likewise are answerable to the law for crimes committed in obeying all orders illegal on their face and in their substance, when such illegality appears at once to a com-

[19] Part of the opinion is omitted.

mon mind, on hearing them read or given." We think there is no error in this charge.

It is a well-settled principle a soldier is not bound to obey an illegal order. If he does, and commits an offense, it is no justification to him, and he is liable to be proceeded against and punished. This principle was settled in the Supreme Court of the United States in the case of Mitchell v. Harmony, 13 How. 129, 14 L. Ed. 75, in which it was held a military officer cannot rely on an apparently unlawful order of his superior as a justification.

The same principle was recognized and settled in the Court of King's Bench, reported in 1 Cowp. 180. In this case a captain in the English navy, by orders of the British admiral, pulled down the houses of some suttlers on the coast of Novo Scotia, who were supplying the sailors with spirituous liquors, and the health of the sailors was thereby much injured. The motive was a laudable one, and done for the public service. The courts say it was an invasion of the rights of private property without the authority of law, and the officer who executed the order was held liable. This being the rule in civil causes, the principle would be more strictly applied in criminal ones. No order, if any was given, could justify the killing of Capt. Thornhill, and the parties who did the act are amenable to the criminal law. There being no error in the charge of the court, the question arises: Do the facts in the record sustain the verdict of the jury? And under the rulings of this court it is made our duty in criminal causes to examine the proof and see if it warrants the conviction. * * *

The proof does not satisfy us the prisoner aided or abetted in the unlawful act of killing. A private soldier, when detailed by his superior officer, has no discretion. By the rules of war he is bound to obey the orders of those in command. When he enters the service, unconditional submission to the lawful orders of his superior officers is a duty imposed upon him by his oath and the articles of war. The principle of law, "when men are assembled for an illegal purpose, and the commission of an offense by any one of the party is the act of the whole," is not applicable to this case. The plaintiff in error being a private soldier, being detailed, was bound to obey the lawful order. The going to Richard Thornhill's without a knowledge of the purpose for which the force was detailed was not an illegal act; he had no right to inquire of the officer the object and purpose of the detail, or what he had in view; and, if he was present, unless he participated in the killing by firing, or aided and abetted in the act of killing, he would not be criminally responsible. It is stated as a principle of law, in 1 Hale, Pleas of the Crown, 444, and which we recognize and approve: "Although if many come upon an unlawful design, and one of the company kill the adverse party in pursuance of that design, all are principals, yet if many be together upon a lawful account, and one of the company kill another of an adverse party, without any particular abet-

ment of the rest to this fact of homicide, they are not all guilty that are of the company, but only those that gave the stroke, or actually abetted them to do it." We forbear to comment further upon the testimony, as the case will undergo another investigation before a jury. We are not satisfied, from the proofs in this record, with the verdict of the jury.

The judgment will be reversed, and a new trial awarded.

IX. Justification—Coercion—Married Women [20]

REX v. HUGHES.

(Lancaster Sp. Assizes, 1813. 2 Lew. 229.)

Martha Hughes, the wife of Patrick Hughes, was indicted for forging and uttering three £2 Bank of England notes.

James Platt proved that he went to the shop of the prisoner's husband, in consequence of a conversation which he had had some time before with the husband. The husband was not present. The prisoner beckoned him to go into an inner room, into which she followed him, when he told her what her husband had said to him. They then agreed about the business, and the witness bought of the prisoner three £2 notes at £1 4s. each.

The witness paid her four £1 notes and was to receive 8s. in change. When he was putting the notes into his pocketbook, and before he received the change, the husband put his head into the room and looked in, but did not come in or interfere in the business, further than by saying, "Get on with you!" When the witness and the prisoner returned into the shop, the husband was there and the prisoner gave him the change, and both the prisoner and the husband cautioned him to be careful.

On these circumstances being proved, Cross, for the prisoner, objected that they clearly established that she acted under the coercion of her husband. Supposing both husband and wife on their trial, this evidence would be sufficient to convict him; and he submitted that, if so, she must in this case be acquitted. He cited 2 East's P. C. 259: "If a wife be guilty of larceny in company with her husband, both of them may be indicted; and if the husband be convicted, the wife shall be acquitted." 1 Hale, 46; Kelynge, 37: "But if the husband be acquitted, and it appear that the felony were by her own

[20] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 40.

voluntary act (by which must be understood that her husband, if present, had no knowledge of or participation in the fact), she may, upon the same indictment, be convicted, for the charge is joint and several." The acquittal or conviction, therefore, of the husband, regulates that of the wife. Here the husband might have been convicted.

THOMPSON, B. (stopping Park and Rain). I am very clear as to the law on this point.

The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption prima facie, and prima facie only (as is strongly laid down by Lord Hale), that it was done under his coercion. But it is absolutely necessary that the husband should be actually present and taking a part in the transaction.

Here it is entirely the act of the wife. It is, indeed, in consequence of a communication previously with the husband that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness.

There was a putting off before the husband came; and it was sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it, prima facie, to his coercion; but, when it has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of his wife) can be referred to what was done in his absence.

Objection overruled.

June 26th 1924

X. Justification—Necessity [21]

UNITED STATES v. ASHTON.

(Circuit Court of the United States, 1834. 2 Sumn. 13 Fed. Cas. No. 14,470.)

Indictment against the defendants for an endeavor to commit a revolt on board the ship Merrimack, of Boston, on the high seas. Plea, not guilty.

At the trial it appeared that the ship sailed from Boston on Saturday, 23d of August, 1834, on a voyage to Rio Janeiro, under the command of Capt. Eldridge. She was then in a leaky condition, and some efforts had been made by the captain to conceal the extent of the leakage from the crew at the time of their shipment and coming

[21] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 41.

on board. The ship was 29 years old. The crew, on discovering the leak in going out of port, expressed a wish to the captain to return and have repairs made. The captain declined, but said if the leak increased he would return. On Wednesday, the 27th of August, the vessel encountered a gale and strained very much; and the crew were up all the night pumping, and were much exhausted. The gale still continued, with every appearance of a continuance. The crew then conversed together, and went to the captain and requested him to return to Boston to repair, and expressed a firm belief that the ship was unseaworthy and that they were all in imminent danger of their lives. The captain declined, but proposed that they should keep on, and, if necessary, he would stop at the Western Islands for repairs. The crew insisted that he ought to return back to Boston, and that the hazard of proceeding on the voyage was imminent; and then, finding that the captain persisted in going on the voyage, declaring that he thought the vessel seaworthy, they refused to do duty any further, and seceded, and remained below several hours, during which time the gale increased, and the ship was in great danger. The captain, at length, in order to induce the crew to return to duty, agreed to return to Boston; and accordingly he wore ship and returned to Boston, where he arrived on the ninth day after her departure. The crew at all other times during the voyage and in all other respects conducted themselves unexceptionably. * * *

STORY, Circuit Judge.[22] I do not think that the act for the government and regulation of seamen in the merchants' service (Act July 20, 1790, c. 29, 1 Stat. 131) has any bearing on the present case. The third section of that act merely provides for the case where the mate and a majority of the crew of a vessel bound on a foreign voyage, after the voyage is begun and before the vessel shall have left the land, shall discover the vessel to be too leaky or otherwise unfit to proceed on the voyage, and under such circumstances it makes it the duty of the master to return to port. It does not in the slightest manner trench upon the general rights and duties of the seamen under the maritime law, but merely imposes an absolute duty on the master in the case specified. All other cases and circumstances remain, therefore, as they were before, to be governed by the general principles of law. In the present case the combination to resist the authority of the master is clearly established, and unless the seamen were, by the circumstances, justified in compelling the master to return home, the offense charged in the indictment is fully made out; and the onus is on the seamen to establish the justification. If the ship was at the time clearly seaworthy and fit for the voyage, whether the seamen acted by fraud, or by mistake, or upon a fair, but false, judgment of the facts, it seems to me the offense was committed. If,

[22] The statement of facts is abridged.

on the other hand, the ship was at the time clearly unseaworthy and unfit for the voyage, they were fully justified in insisting upon her return home, and were guilty of no offense. The law deems the lives of all persons far more valuable than any property, and will not permit a master, under color of his acknowledged authority on board of the ship, from rashness, or passion, or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties which are so imminent and overwhelming that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions. If he should order them into a boat on the ocean, at a time when they could scarcely fail of being swamped or foundered, they would not be bound to obey. His commands, to be entitled to obedience, must, under the circumstances, be reasonable. The proposition cannot for a moment be maintained that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose in their rashness of judgment to proceed.

It is true that in all cases of doubt the judgment of the master and officers ought to have great weight, and from their superior intelligence, ability, and skill it may be relied on with far more confidence than that of the crew. They are embarked in the same common enterprise and risks, and it cannot be ordinarily presumed that they will hazard their own lives in a vehicle which is really unfit for the voyage. Still, if the case does occur, if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, I am clear that the crew have a right to resist, and to refuse obedience. It is a case of justifiable self-defense against an undue exercise of power. Neither of these cases is of any real difficulty. But the case of difficulty is this: Suppose the ship to be in that state in which the presumption of apparent unseaworthiness really arises, and the crew bona fide act upon that presumption, and the jury should be of opinion that they acted justifiably upon that presumption at the time; and suppose upon the trial it should turn out (as in the present case it may) that there is real doubt whether the ship be seaworthy or not, or upon the evidence the case is nearly balanced in the conflict of credible, as well as competent, testimony, and the jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness, but not to place it entirely beyond doubt; I ask whether, under such circumstances, the crew ought to be convicted of the offense charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert that they should have done the same, and where even the jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial? I have great difficulty in coming to the con-

clusion that under such circumstances the crew were guilty of the offense charged.

I am aware of the dangers of not upholding with a steady hand the authority of the master; but I am not the less aware of the necessity of having a just and tender regard for life. Seamen, when they contract for a voyage, do not contract to hazard their lives against all perils which the master may choose they shall encounter. They contract only to do their duty and meet the ordinary perils, and to obey reasonable orders. The relation between master and seaman is created by the contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offenses, and especially where there is perfect integrity of intention. I am aware that in some cases crimes may be committed independently of any supposed intention to do wrong. But in most cases, and I think in a case of this nature, the intention and the act must both concur to constitute an offense. There are cases even of the highest crimes, as of homicide, where an honest and innocent mistake in killing another, under circumstances of a reasonable presumption, though a mistaken one, that the party killed intended to kill the other party, when the latter will be excused by law.

I have had this subject a good deal in my thoughts during the progress of this trial (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful whether the ship was seaworthy, or even in a measuring cast should incline to believe the ship seaworthy. If she was clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted, for the facts of the combination and resistance are admitted.

Mem.—Upon these suggestions of the court, the district attorney said that his own opinion coincided with that of the court, and that he would enter a nolle prosequi, but he had thought it his duty to bring the case before the court; and the court said that the case was very properly brought before it for decision.

PARTIES CONCERNED IN THE COMMISSION OF CRIMES

I. Principals in the First Degree [1]

REGINA v. MANLEY.

(Somerset Lent Assizes, 1844. 1 Cox, C. C. 104.)

Indictment for larceny.

The facts, as proved by the prosecution, were that the prisoner was an apprentice of the prosecutor; that he had induced the son of the prosecutor, a child of the age of nine years, to take money from his father's till, and give to him. On cross-examination, it further appeared that the child had done the like for other boys.

Cox, for the prisoner, submitted that the evidence did not sustain the indictment. The prisoner was charged with stealing money as principal. The evidence showed him to be either an accessory or a receiver. If an offense be committed through the medium of an innocent agent, the employer, though absent when the act was done, is answerable as a principal. R. v. Giles, 1 Moody, C. C. 166; Reg. v. Michael, 2 Moody, C. C. 120, 9 Car. & P. 356. But if the instrument be aware of the consequences of his act, he is the principal in the first degree; and the employer, if he be absent when the act is committed, is an accessory before the fact. R. v. Stewart, R. & R. 363. In this case the evidence had shown beyond doubt that the child was of the age of discretion and fully aware of the consequences of his act.

WIGHTMAN, J. What do you mean by an innocent agent, if this child be not one?

Cox: An agent who, from age, defect of understanding, ignorance of the fact, or other cause, cannot be particeps criminis.

WIGHTMAN, J. But though an act done through the medium of an innocent agent makes the prisoner a principal, how do you show that he is not a principal, where the act is done through the medium of a responsible agent?

Cox: Because, if the agent be responsible, he becomes principal; and to constitute a principal he must be the actor or actual perpetrator of the fact, or cognizant of the crime, and near enough to render assistance. Though there be a previous concerted plan, those not present or near enough to aid at the time when the offense is committed

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 46.

are not principals, but accessories before the act. See cases cited Arch. (9th Ed.) p. 4.

WIGHTMAN, J. It is a question for the jury, if the child was an innocent agent.

WIGHTMAN, J. (to the jury). Apart from the consideration of the guilt or innocence of the prisoner generally, if you believe the story told by the child, you will have to determine whether the child was an innocent agent in this transaction—that is, whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt, and entirely at the dictation of the prisoner; for, if you should be of opinion that he was not an innocent agent, you cannot find the prisoner guilty as a principal under this indictment.

Verdict—Not guilty.

II. Principals in the Second Degree[2]

THORNTON v. STATE.

(Supreme Court of Georgia, 1903. 119 Ga. 437, 46 S. E. 640.)

FISH, P. J.[3] * * * If Thornton had given his pistol to Amos, with instructions or advice to kill Sam Gordon with it, and Amos had done so when Thornton was present, and nothing more had appeared, then Thornton would have been guilty as principal in the second degree. The evidence for the state shows, however, that when Thornton loaned his pistol to Amos he told, or advised, him to kill Gordon with it, if he should again rob Amos at cards. His advice or instruction to kill Gordon was, therefore, conditional, or dependent upon the event that Gordon should again rob Amos at cards. Even granting that there was enough in the evidence to authorize the jury to infer that Amos and Gordon had, subsequently to the loan of the pistol, engaged in playing cards, we think there is nothing in the evidence from which the jury could fairly infer that Gordon had robbed Amos in such a game, or that the killing was in consequence of such robbery. Of course, we do not use the words "robbed" and "robbery" here in their limited legal sense, but as including cheating in a game of cards played for money. The evidence shows that Amos stated to Gordon that he owed him a dime. This Gordon denied, but paid it, saying at the time that he would make some of them shoot him; whereupon Amos immediately shot and killed him.

[2] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 47.

[3] Part of the opinion is omitted.

From these facts we do not think it can be successfully contended that the evidence shows that, at the time of the homicide, there was in the mind of Thornton the same criminal intent and felonious design that was in the mind of Amos. The common intent and purpose in the minds of both, at the time that Thornton furnished Amos with the pistol, was that Amos should kill Gordon if the latter should again rob him at cards. There is nothing in the evidence to show, or to authorize the jury in finding, that Thornton ever had any other criminal intent. If Amos, after procuring the pistol from Thornton, had casually met Gordon and immediately shot him, without any provocation whatever, certainly Thornton would not have been guilty of murder as a principal in the second degree, although he had been present on the occasion of the homicide, if he did nothing then to aid or abet the commission of the crime. It follows from what we have said that the court should have granted a new trial, upon the ground that there was no evidence to support the verdict.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

MERCERSMITH v. STATE.

(Court of Appeals of Texas, 1880. 8 Tex. App. 211.)

WHITE, P. J.[4] In our opinion this cause must be reversed, because the court failed to submit the law applicable to the vital issues necessarily raised by the evidence elicited on the trial. Substantially stated, the facts in brief are that one George Purtell and the defendant were found by deceased inside his house sometime about 11 o'clock at night. Deceased and his wife and stepdaughter were returning from prayer meeting, when, near his house, they heard the cries and screams of the three children, who had been left at home during their absence. Deceased hurried on to see what the matter was, when, stepping inside his door, he was immediately fired upon by Purtell. After the second shot, deceased fled, and Purtell pursued him into the yard and fired a third shot, or fourth, according to some of the witnesses, which penetrated about the knee joint, severing the femoral artery, and from which wound he died some 14 days afterwards.

At the time of the shooting this appellant was lying upon a pallet upon which the three children slept, and had the eldest, a young girl between 10 and 12 years of age, in his arms, with her clothes up, and, as she says, was choking her. She and the other children were crying and hallooing. The door of the house had been broken down and torn from its hinges by Purtell and defendant when they effected their entrance into the house, and immediately after the entry defend-

[4] The statement of facts is omitted.

ant laid down upon the pallet with the children, whilst Purtell remained standing near the doorway. But a very few seconds could have elapsed from their entry until the appearance of Henderson, the deceased, and the shooting as above detailed. There was evidence tending to show that these parties had been at the house before to see the girls (the one defendant had in his arms when discovered, and the stepdaughter who had gone to prayer meeting); the intimation being clear that their object on these previous visits was carnal intercourse. Whether such carnal intercourse had taken place previously is not made manifest. Other evidence tended to show that this defendant was quite drunk; but after the shooting he got up and joined Purtell, when they both mounted their horses and went off together.

In a charge characterized by great precision for its declaration of the principles of law relative to murder of the first and second degrees, the court further instructed the jury fully with regard to the general principles of law as enunciated in the Code with regard to joint or principal offenders engaged in a common purpose and actuated by a common design in the accomplishment of an unlawful act, and their reciprocal liability for the acts of each other. Pen. Code 1879, arts. 74–76, 78. But the charge failed to draw the distinction which the law makes between cases of combination and conspiracy to do an unlawful act and the liability of one and all for the acts and deeds of all when the common purpose might be to do an act not in itself unlawful, and in the execution of which one of the parties engaged committed a felony.

In the case at bar there would be a marked distinction as to the liability of the parties when tested by what was the common purpose which united them together at the time Purtell alone engaged in the shooting which resulted in the homicide.

If the common purpose was to commit an unlawful act—as, for instance, burglary—which would be evidenced by the fact that they broke down the door and forcibly entered the house at night, or that they broke down the door and forcibly entered the house to commit rape (Pen. Code 1879, art. 704), then, manifestly, the original purpose and common design being to commit a felony, any act done by either one of the parties whilst engaged in the unlawful act would be imputed and attach its criminality to the other, and make each liable jointly for whatever either may have done in the general purview of the common design during the execution of the original unlawful enterprise. But if the common undertaking was in itself not unlawful—as, for instance, if the parties entered the house, but in the entry did not intend to commit burglary or any other felony or unlawful act, but their object was alone to have carnal intercourse with the girls, with whom they had before had such intercourse, and whilst the defendant was in the act of accomplishing this object his

companion, Purtell, without his knowledge or consent, shot and killed Henderson—in such event, even though the shooting might have been done to enable both to evade discovery and effect their escape from the house, the defendant would not be liable for the homicide.

It is the lawfulness or criminality of the purpose and common design which gives scope and character to acts committed in connection with its perpetration. To constitute principals in an offense, the purpose must be unlawful. "For if the original intention was lawful and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the other persons who are present, and who do not actually aid and abet, are not guilty as principals; for they assembled for another purpose, which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention." Fost. 354; 2 Hawk. P. C. c. 29, § 9; 2 Archb. Cr. Pr. & Pl. (6th Ed.) 251–257, and note.

But Mr. Wharton says: "It should be observed, however, that, while the parties are responsible for collateral acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus, if one of the party of his own head turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt." Whart. on Hom. § 202. Yet, "where two persons go out for the common purpose of robbing a third person, and one of them, in pursuit of such common purpose, kill such third person under such circumstances as to make it murder in him who does the act, then it is murder in the other." Id. § 338; Ruloff v. People, 45 N. Y. 213; Green v. State, 13 Mo. 382; 1 Bishop's Cr. Law (4th Ed.) § 435; Hanna v. People, 86 Ill. 243.

Nor is it necessary that the common guilty purpose of resisting to the death any person who should endeavor to apprehend them must have been formed when the parties went out with the common design of committing the unlawful act, to render all principals in a murder by one of them perpetrated whilst making such resistance. Ruloff v. People, 45 N. Y. 213; State v. Nash, 7 Iowa, 350; Moody v. State, 6 Cold. (Tenn.) 299.

In the case of People v. Knapp, 26 Mich. 112, it was held "that where parties combine to commit an offense, and a homicide is committed by part of them in an attempt to escape, one who did not consent and was not privy in fact to the homicide cannot be held responsible by reason of the original combination. There can be no responsibility against one who is not himself engaged in the acts of his associates, unless it is within the scope of the combination to which he was a party, and thus authorized as his joint act."

It is unnecessary that we should discuss the other questions in the case.

The judgment of the court below will be reversed, in order that upon another trial the court may submit the principles of law applicable to the issues as we have presented them in the foregoing opinion.

Reversed and remanded.

STATE v. ALLEN.

(Supreme Court of Errors of Connecticut, 1879. 47 Conn. 121.)

Indictment for murder in the Superior Court for Hartford county. The prisoner was indicted with Harry Hamlin and John H. Davis for the murder of Welles Shipman, a watchman at the state prison; the murder having been committed in an attempt of the defendant and Hamlin, who were convicts, to escape from the prison. The jury found a verdict of murder in the first degree. The defendant thereupon moved for a new trial for error in the rulings and charge of the court, and also filed a motion in error.

BEARDSLEY, J.[5] * * * The motion for a new trial shows that upon the trial it was claimed by the state that the accused and one Henry Hamlin, both of whom were lawfully confined in the state prison, conspired to escape from such confinement, and to use all means which might become necessary to effect such escape, even to the taking of the life of any one who might oppose them, should it become necessary to do so in order to overcome such opposition; that in pursuance of such combination they provided themselves with two loaded revolver pistols, one a seven-shooter, and the other a four-shooter, and with handcuffs and a gag, and on the evening of September 1, 1877, escaped from their cells and secreted themselves in the hall of the prison, where they were discovered by Welles Shipman, an armed night watchman of the prison, and that thereupon they both fired at Shipman, who was wounded by one of the shots, and died from such wound on the next day; and that after Shipman was wounded he ran towards the alarm bell, pursued by the accused and Hamlin, who overtook him, when he sank insensible upon the corridor, and was then handcuffed and gagged by them; that Allen then went to his cell about 150 feet distant, leaving Hamlin with Shipman, where he was discovered and fired at by the guard of the prison; and that thereupon Hamlin went to the cell of Allen, and that both then broke into the attic and were taken the next morning. The state claimed that Shipman was shot before he was handcuffed.

It was claimed by the defense that, if there was any conspiracy

[5] The statement of facts is abridged and part of the opinion is omitted.

between the accused and Hamlin, it was merely to bribe an officer of the prison to permit them to escape, and that whatever was done after Shipman discovered the accused and Hamlin was not in pursuance of any plan or conspiracy, and that immediately after Shipman was handcuffed and gagged Allen abandoned the enterprise and went to his cell, and that Shipman was afterwards shot by Hamlin alone. * * *

The court charged the jury as follows: "If the jury shall find that Hamlin and Allen, at some time previous to the homicide, made up their minds in concert to break the state prison and escape therefrom at all hazard, and knowing that the enterprise would be a dangerous one and expose them to be killed by the armed night watchman of the prison, should they be discovered in making the attempt, willfully, deliberately, and premeditatedly determined to arm themselves with deadly weapons, and kill whatever watchman should oppose them in their attempt, and if the jury should further find that in pursuance of such design they armed themselves with loaded revolvers to carry their original purpose into execution, and while engaged in efforts to escape from the prison were discovered by the watchman, Shipman, the deceased, and in the scuffle which ensued he was willfully killed by Hamlin or Allen while they were acting in concert and in pursuance of their original purpose so to do in just such an emergency as they now found themselves in, then Hamlin and Allen are both guilty of murder in the first degree. And in the opinion of the court Allen would be guilty of murder in the first degree, if, in the state of things just described, he in fact abandoned, just before the fatal shot was fired by Hamlin, all further attempt to escape from the prison, and the infliction of further violence upon the person of Shipman, without informing Hamlin by word or deed that he had so done, and Hamlin, ignorant of the fact, shortly after fired the fatal shot in pursuance of and in accordance with the purpose of the parties down to the time of the abandonment."

We do not think that the objection made by the defense to this part of the charge is well founded. Under such circumstances, Allen's so-called abandonment would be but an operation of the mind —a secret change of purpose. Doing nothing by word or deed to inform his co-conspirator of such change of purpose, the reasonable inference would be that he did not intend to inform him of it, and thus he would be intentionally encouraging and stimulating him to the commission of the homicide by his supposed co-operation with him. Such intent not to inform Hamlin of his change of purpose would, under the circumstances, be decisive of his guilt.

But the charge proceeds: "In other words, if during the fatal encounter with deadly weapons, in the state of things just described, Allen suddenly abandoned Hamlin, abandoned the enterprise, and went to his cell without saying a word to Hamlin to the effect that he

had abandoned the enterprise, and Hamlin, supposing that he was still acting with him and that he had gone to his cell for an instrument to carry on the encounter, fired the fatal shot, his abandonment under such circumstances would be of no importance. A man cannot abandon another under such circumstances and escape the consequences of the aid he has rendered up to the time of the abandonment."

A majority of the court think that the jury may have been misled by this part of the charge, and that therefore, especially in view of the grave issues involved in this case, a new trial should be granted.

If Allen did in fact before the homicide withdraw from the conspiracy, abandon the attempt to escape, and with the knowledge of Hamlin leave and go to his cell, Hamlin's misconstruction of his purpose in leaving did not necessarily make his conduct of no importance.

Until the fatal shot there was the "locus penitentiæ." To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if, with the intention of notifying Hamlin of his withdrawal from the conspiracy, he did acts which should have been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed.

Allen's act of leaving and going to his cell, if he did so, had some significance in connection with the question of intention and notice, and was therefore proper for the consideration of the jury. How much weight was to be given to it would depend upon circumstances, such as the situation of the parties and the opportunity for verbal or other notice.

The same observations are perhaps applicable to the charge of the court in answer to the sixth request for instructions. While it is clear that the request as made should not have been complied with, the charge that was given may be open to the implication that some notice of Allen's abandonment of the conspiracy must have been given by him to Hamlin beyond that afforded by his act of leaving.

The answers of the court to the other requests for instructions seem to us, in view of the claims of the counsel and the admitted facts in the case, to be correct and sufficiently explicit.

A new trial is advised.

GRANGER, SANFORD, and HOVEY, JJ., concurred. LOOMIS, J., dissented.

III. Accessories Before the Fact[6]

REGINA v. JEFFRIES et al.

(Central Criminal Court, 1848. 3 Cox, C. C. 85.)

The prisoners were indicted for larceny in a dwelling house. It appeared that Jeffries was clerk to one Whittock, the prosecutor, who was a coal dealer. The prosecutor's money chest was kept in a room adjoining the office, and of the door of this room the prisoner Jeffries had a key. On the night of the larceny he was proved to have unlocked the door and then gone away. About 20 minutes afterwards the prisoner Bryant came to the room and removed the money chest. It was attempted to be shown, on the part of the prisoner Jeffries, that he was three-quarters of a mile from the prosecutor's premises at the time Bryant was there.

CRESSWELL, J., told the jury that where one person opens the door of a house which contains the articles stolen, and then goes away, and another in his absence, but acting in concert with him, enters the house and commits the larceny, the one who opens the door is not guilty as a principal in the act.

Greaves, for the prosecution, submitted that Jeffries was guilty of a joint larceny, although he was not actually present at the time of the removal by Bryant. In the case of burglary, where the breaking is in one night and the entry the next night, a person present at the breaking, though not present at the entering, is in law guilty of the whole offense. Rex v. Jordan, 7 C. & P. 432.

CRESSWELL, J., said he would consult Mr. Justice PATTESON, sitting in the Nisi Prius Court. On his return, he said Mr. Justice PATTESON agreed with him, and entertained no doubt on the point; and accordingly

CRESSWELL, J., directed the jury, if they believed that Jeffries was not present assisting Bryant at the time of the removal of the chest, to acquit him.

[6] For discussion of principles, see Clark on Criminal Law (3d Ed.) § 48.

IV. Accessories After the Fact[1]

REGINA v. BUTTERFIELD.

(Yorkshire Winter Assizes, 1843. 1 Cox, C. C. 39.)

The prisoner was indicted as an accessory after the fact. The indictment stated that at a general sessions of Oyer and Terminer, etc., holden, etc., on the 12th July, in the seventh year, etc., before, etc., it was presented that Thomas Butterfield, then late of, etc., and Patrick Burke, then late of, etc. (it then sets out the former indictment against Burke and Butterfield, for a robbery of a £100 note), upon which said indictment the said T. Butterfield was, at the general sessions, etc., aforesaid, found not guilty, etc., and the said Patrick Burke was duly convicted and found guilty of the felony and robbery aforesaid, as by the said record thereof more fully and at large appears. And the jurors aforesaid, etc., that the said Thomas Butterfield, well knowing the said Patrick Burke to have done and committed the robbery aforesaid, after the same was committed, to wit, on, etc., at, etc., him, the said Patrick Burke, did feloniously receive, harbor, maintain, relieve, aid, comfort, and assist, contrary to the form of the statute, etc., and against the peace, etc.

The prisoner had been indicted, together with Burke, for a robbery of the note from a person of the name of Turner; and it appeared that, shortly after the robbery was committed, Butterfield applied to his landlady to change the note, but did not succeed, and that Burke then went to a shop to purchase some articles, for the payment of which he tendered the note, and received a large part of it in change, and that during the time he was in the shop Butterfield was waiting outside.

Bliss then submitted that the evidence did not support the indictment. The prisoner is not charged with being an accessory after the fact under the statute which makes receiving stolen goods a felony, but at common law. He is charged with feloniously "receiving, harboring, maintaining, relieving, aiding, comforting, and assisting Burke"; but that is not at all maintained by showing anything done with the stolen property. Harboring, etc., means doing something to enable the prisoner to escape. If it had meant assisting him in making away with the stolen property, the statute would have been useless; for at common law, to make a man an accessory after the fact, he must have given the felon some personal assistance. "An accessory after

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 49.

the fact is one who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon." 1 Hale, 618; Archbold's Crim. Law (7th Ed.) 8. "With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down that generally any assistance whatever given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose, as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape, or where any one harbors and conceals in his house a felon under pursuit, in consequence of which his pursuers cannot find him; much more, where the party harbors a felon, and the pursuers dare not take him." Hawk. P. C. p. 2, c. 29, § 26; Roscoe on Cr. Ev. 208.

Wilkins and Pickering, contra. Quite enough has been proved to leave this case for a jury to decide. There can be no doubt that Butterfield was outside the shop with the intention of aiding and assisting Burke in getting rid of the note, and was there with the intention of aiding him in his escape, and he consequently comes within Lord Hale's definition. It is for the jury to say whether he did know that a felony had been committed, and was there to aid and assist. The statute has made no difference. In one sense, enabling the felon to get rid of the stolen property is a mode of preventing his being apprehended and tried, and is a kind of personal assistance; but the true definition is, "any means by which a party, knowing a felony to have been committed, enables the felon to obtain the fruits of that felony." If so, we come within that definition.

Bliss, in reply. My complaint is that we are charged with receiving and harboring the felon, but the proof is of receiving the goods. That cannot come within the words "comfort and assistance." There is no evidence of any personal act of receiving, comforting, or assisting him, nor any evidence which, at common law, would constitute the prisoner an accessory after the fact.

MAULE, J.[8] I think there is evidence of comforting and assisting which would make the prisoner an accessory after the fact. If a man stole a horse, and another assisted him in coloring and disguising him, so that he could not be known again, that would make him an accessory. Here the prisoner assists the party who has stolen the goods to get rid of them, and thus evade the justice of the country.

MAULE, J. (to the jury). The question is whether the prisoner gave assistance, comfort, and aid to Burke, knowing he had committed this robbery? The evidence is that they were found in Gally's shop, very earnest to get change, and before that, on the same day, Butterfield had applied to the landlady for change. Now, supposing that Butterfield had known this was a robbery, and was assisting Burke in get-

[8] Part of this case is omitted.

ting money, and thus suppressing the important evidence of the possession of the note, I think that there was assistance within the meaning of the statute. If you are convinced that the prisoner knew that this money was a part of the proceeds of the robbery, and that he went with Burke to enable him to effect his object in getting rid of the money, then you must find him guilty. If he did not know that Burke was guilty of this robbery, or that this bank note was part of it, you ought to acquit him.

The prisoner was found guilty. * * *

V. Principal's Liability for Acts of Agent [9]

COMMONWEALTH v. STEVENS.

(Supreme Judicial Court of Massachusetts, 1892. 155 Mass. 291, 29 N. E. 508.)

KNOWLTON, J.[10] * * * The only other exceptions argued relate to the refusal of the court to give the defendant's third request for instructions to the jury, and to the instructions given.

The instructions given were as follows: "If you are satisfied beyond a reasonable doubt that the defendant stood by and saw this sale to the minor, and assented to it, he is liable for the sale. If the defendant used proper care in the selection of his clerks, and used proper precautions by instructions to and supervision of his clerks, he was not bound to personally scrutinize the person of every customer who applied for liquor. If he does see the customers, and any of them are minors, and he stands by, knowing that a sale is made by a clerk to a minor, and he does not prevent it, he is liable. The defendant is not liable if the sale by the clerk was an honest mistake on the part of the clerk as to the age of the person to whom he sold, provided the jury are satisfied that the master sincerely and honestly intended that his instructions should be obeyed in good faith, and that he was not negligent or careless in the selection of his clerks, or in the regulations and precautions which he prescribed for their guidance. The evidence as to the other sales made, and the business carried on at the store, is only competent upon the question of the reasonableness of the precautions taken by the defendant to prevent sales to minors, and whether the

[9] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 52.

[10] The statement of facts and part of the opinion are omitted.

method of determining the age of a customer was a reasonable one, or whether it indicated bad faith or negligence on the part of the defendant in the mode of conducting his business."

The request was as follows: "If the sale and attendant circumstances found by the jury are consistent with the theory that defendant really intended that no sale should be made to minors, but was merely negligent, then the jury must acquit."

The question before the jury was, not whether the defendant intended that no sale should be made to minors, but whether the sale which was made was his act. If he made the sale, and intended to make it, it would be no defense that he was mistaken in supposing that the buyer was not a minor. It is to be remembered that the statute forbidding the unlicensed sale of intoxicating liquor, like the laws regulating the sale of milk, and many other similar statutes, punishes the unlawful act, and on grounds of public policy holds the defendant responsible for knowledge of the nature of his act; so that it is possible in a supposable case for one to be guilty of a technical violation of the law without culpability, and to find it necessary for his protection to appeal to the sense of justice of those who are intrusted with the administration of the law. Commonwealth v. Uhrig, 138 Mass. 492. If the sale was made by his clerk, and if it was authorized by him by special authority in the particular case, or by a general authority which included it, it would be no defense to show that he did not intend to make sales to minors, but was negligent in not taking measures to prevent them. Through a long line of cases the test of the master's liability for an act of this kind done by his servant has been whether it was done by his authority. Commonwealth v. Putnam, 4 Gray, 16; Commonwealth v. Wachendorf, 141 Mass. 270, 4 N. E. 817; Commonwealth v. Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; Commonwealth v. Stevenson, 142 Mass. 466, 8 N. E. 341; Commonwealth v. Hayes, 145 Mass. 289, 14 N. E. 151; Commonwealth v. Rooks, 150 Mass. 59, 22 N. E. 436.

The criminal liability of a master for the act of his servants does not extend so far as his civil liability, inasmuch as he cannot be held criminally for what the servant does contrary to his orders, and without any authority, express or implied, merely because it is in the course of his business and within the scope of the servant's employment; but he would be liable civilly for a tort of this kind. Roberge v. Burnham, 124 Mass. 277; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376. But if the act is the master's, because done by the servant within his authority, and especially if it is an act which is made punishable even when done in ignorance of its punishable quality, the statute applies to the master as well as to the servant.

The defendant was not aggrieved by the instructions given. In one part of the case the jury were told that the proof must be beyond a

reasonable doubt, and if the defendant had desired that their attention should be further directed to the degree of proof upon other points he should have asked for an instruction in regard to it.

A part of the charge was directed to evidence that the defendant stood by and saw the sale made, and there was no error in it. The instructions which are chiefly criticised by the defendant's counsel followed closely the language of the opinion of this court at the former hearing of this case, reported in 153 Mass. 421, 26 N. E. 992, 11 L. R. A. 357, 25 Am. St. Rep. 647, and the rights of the defendant were fully protected by them.

Exceptions overruled.

Oct 3rd — 1924.

THE OVERT ACT—ATTEMPTS, SOLICITATIONS, AND CONSPIRACY

I. Attempts [1]

STATE v. HURLEY.

(Supreme Court of Vermont, 1906. 79 Vt. 28, 64 Atl. 78, 6 L. R. A. [N. S.] 804, 118 Am. St. Rep. 934.)

MUNSON, J.,[2] delivered the opinion of the court.

The respondent is informed against for attempting to break open the jail in which he was confined, by procuring to be delivered into his hands 12 steel hack saws, with an intent to break open the jail therewith. The state's evidence tended to show that, in pursuance of an arrangement between the respondent and one Tracy, a former inmate, Tracy attempted to get a bundle of hack saws to the respondent by throwing it to him as he sat behind the bars at an open window, and that the respondent reached through the bars and got the bundle into his hands, but was ordered at that moment by the jailer to drop it, and did so. The court charged, in substance, that if the respondent arranged for procuring the saws, and got them into his possession with an intent to break open the jail for the purpose of escaping, he was guilty of the offense alleged. The respondent demurred to the information, and excepted to the charge. Bishop defines a criminal attempt to be "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 2 Crim. Law, § 728. The main difficulty in applying this definition lies in determining the relation which the act done must sustain to the completed offense. That relation is more fully indicated in the following definition given by Stephen: "An attempt to commit a crime is an act done with intent to commit that crime, and forming a part of a series of acts which would constitute its actual commission if it were not interrupted." Dig. Crim. Law, 33. All acts done in preparation are, in a sense, acts done towards the accomplishment of the thing contemplated. But most authorities certainly hold, and many of them state specifically, that the act must be something more than mere preparation. Acts of preparation, however, may have such proximity to the place where the intended crime is to be committed, and such connection with a purpose of present accomplishment, that they will amount to an attempt. See

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 55, 56.

[2] The statement of facts is omitted.

note to People v. Moran (N. Y.) 20 Am. St. Rep. 741; People v. Stites, 75 Cal. 570, 17 Pac. 693; People v. Lawton, 56 Barb. (N. Y.) 126.

Various rules have been formulated in elucidating this subject. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offense is to be committed are ordinarily too remote to satisfy the requirement. 1 Bishop, Crim. Law, §§ 759, 762 (4), 763. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. 3 Am. & Eng. Enc. Law (2d Ed.) p. 266, note 7. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. Hicks v. Commonwealth, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891. But after all that has been said the application is difficult.

One of the best known cases where acts of preparation were held insufficient is People v. Murray, 14 Cal. 159, which was an indictment for an attempt to contract an incestuous marriage. There the defendant had eloped with his niece with the avowed purpose of marrying her, and had taken measures to procure the attendance of a magistrate to perform the ceremony. In disposing of the case, Judge Field said: "Between preparations for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." Mr. Bishop thinks this case is near the dividing line, and doubts if it will be followed by all courts. 1 Crim. Law, § 763 (3). Mr. Wharton considers the holding an undue extension of the doctrine that preliminary preparations are insufficient. Crim. Law, 181, note. But the case has been cited with approval by courts of high standing. The exact inquiry presented by the case before us is whether the procurement of the means of committing the offense is to be treated as a preparation for the attempt, or as the attempt itself. In considering this question, it must be remembered that there are some acts, preparatory in their character, which the law treats as substantive offenses; for instance, the procuring of tools for the purpose of counterfeiting, and of indecent prints with intent to publish them. Comments upon cases of this character may lead to confusion, if not correctly apprehended. Wharton, Crim. Law, § 180, and note 1.

The case of Griffin v. State, 26 Ga. 493, cited by the respondent, cannot be accepted as an authority in his favor. There the defendant was charged with attempting to break into a storehouse with intent to steal, by procuring an impression of the key to the lock and preparing from this impression a false key to fit the lock. The section of the Penal Code upon which the indictment was based provides for the in-

dictment of any one who "shall attempt to commit an offense prohibited by law, and in such an attempt shall do any act toward the commission of such offense." The court considered that the General Assembly used the word "attempt" as synonymous with "intend," and that the object of the enactment was to punish "intents," if demonstrated by an act. The court cited Rex v. Sutton, 2 Strange, 1074, as a strong authority in support of the indictment. There the prisoner was convicted for having in his possession iron stamps, with intent to impress the scepter on sixpences. This was not an indictment for any attempt, but for the offense of possessing tools for counterfeiting with intent to use them. The Georgia court, by its construction of the statute, relieved itself from the distinction between "attempts" and crimes of procuring or possessing with unlawful intent.

The act in question here is the procuring by a prisoner of tools adapted to jail-breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

Exceptions sustained, judgment and verdict set aside, demurrer sustained, information held insufficient and quashed, and respondent discharged.

PEOPLE v. JAFFE.

(Court of Appeals of New York, 1906. 185 N. Y. 497, 78 N. E. 169, 9 L. R. A. [N. S.] 263, 7 Ann. Cas. 348.)

WILLARD BARTLETT, J.[8] The indictment charged that the defendant on the 6th day of October, 1902, in the county of New York, feloniously received 20 yards of cloth, of the value of 25 cents a yard, belonging to the copartnership of J. W. Goddard & Son, knowing that the said property had been feloniously stolen, taken and carried away from the owners. It was found under section 550 of the Penal Code, which provides that a person who buys or receives any stolen property knowing the same to have been stolen is guilty of criminally receiving such property. The defendant was convicted of an attempt to commit the crime charged in the indictment. The proof clearly showed, and

[8] The statement of facts is omitted.

the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6, 1902, had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact, the property had been restored to the owners, and was wholly within their control, and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether, upon an indictment for receiving goods knowing them to have been stolen, the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property.

The conviction was sustained by the Appellate Division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the "Pickpocket Cases," where, in prosecutions for attempts to commit larceny from the person by pocket-picking, it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. Commonwealth v. McDonald, 5 Cush. (Mass.) 365; Rogers v. Commonwealth, 5 Serg. & R. (Pa.) 463; State v. Wilson, 30 Conn. 500; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732. Much reliance was also placed in the opinion of the learned Appellate Division upon the case of People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, where a conviction of an attempt to commit the crime of extortion was upheld, although the woman from whom the defendant sought to obtain money by a threat to accuse her of a crime was not induced to pay the money by fear, but was acting at the time as a decoy for the police, and hence could not have been subjected to the influence of fear. In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, therefore, if it had been completely effected, could not constitute the crime of receiving stolen property knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a nonexistent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. 2 Bishop, New Crim. Law, § 1140. It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact.

The crucial distinction between the case before us and the pick-

pocket cases, and others involving the same principle, lies, not in the possibility or impossibility of the commission of the crime, but in the fact that in the present case the act which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy and received them into his possession, he would have committed no offense under section 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such a manner as to constitute larceny. This knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and in fact. He may believe it to be so, but belief is not enough under the statute. In the present case it appeared, not only by the proof, but by the express concession of the prosecuting officer, that the goods which the defendant intended to purchase had lost their character as stolen goods at the time of the proposed transaction. Hence, no matter what was the motive of the defendant, and no matter what he supposed, he could do no act which was intrinsically adapted to the then present successful perpetration of the crime denounced by this section of the Penal Code, because neither he nor any one in the world could know that the property was stolen property, inasmuch as it was not, in fact, stolen property. In the pickpocket cases the immediate act which the defendant had in contemplation was an act which, if it could have been carried out, would have been criminal; whereas in the present case the immediate act which the defendant had in contemplation (to wit, the purchase of the goods which were brought to his place for sale) could not have been criminal under the statute, even if the purchase had been completed, because the goods had not in fact been stolen, but were, at the time when they were offered to him, in the custody and under the control of the true owners.

If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended. 1 Bishop's Crim. Law (7th Ed.) § 747. The crime of which the defendant was convicted necessarily consists of three elements: First, the act; second, the intent; and, third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft. The language used by Ruger, C. J., in People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A.

109, 20 Am. St. Rep. 732, quoted with approval by Earl, J., in People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, to the effect that "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design," although accurate in those cases, has no application to a case like this, where, if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense. A particular belief cannot make that a crime which is not so in the absence of such belief. Take, for example, the case of a young man who attempts to vote, and succeeds in casting his vote under the belief that he is but 20 years of age, when he is in fact over 21 and a qualified voter. His intent to commit a crime, and his belief that he was committing a crime, would not make him guilty of any offense under these circumstances, although the moral turpitude of the transaction on his part would be just as great as it would if he were in fact under age. So, also, in the case of a prosecution under the statute of this state which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of 18 years. There could be no conviction if it was established upon the trial that the female was in fact over the age of 18 years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act forbidden by this particular statute. "If what a man contemplates doing would not be in law a crime, he could not be said, in point of law, to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding, where the law holds it not to be such; his real intent being to do a particular thing. If the thing is not a crime, he does not intend to commit one whatever he may erroneously suppose." 1 Bishop's Crim. Law (7th Ed.) § 742.

The judgment of the Appellate Division and of the Court of General Sessions must be reversed, and the defendant discharged upon this indictment, as it is manifest that no conviction can be had thereunder. This discharge, however, in no wise affects the right to prosecute the defendant for other offenses of a like character concerning which there is some proof in the record, but which were not charged in the present indictment.

CHASE, J. (dissenting). I dissent. Defendant having, with knowledge, repeatedly received goods stolen from a dry goods firm by one of its employés, suggested to the employé that a certain specified kind of cloth be taken. He was told by the employé that that particular kind of cloth was not kept on his floor, and he then said that he would take a roll of certain Italian cloth, and carried it away, but left it in another store, where he could subsequently get it for delivery to the defendant. Before it was actually delivered to the defendant

the employers discovered that the employé had been stealing from them, and they accused him of the thefts. The employé then confessed his guilt, and told them of the piece of cloth that had been stolen for the defendant, but had not actually been delivered to him. The roll of cloth so stolen was then taken by another employé of the firm, and it was arranged at the police headquarters that the employé who had taken the cloth should deliver it to the defendant, which he did, and the defendant paid the employé about one-half the value thereof. The defendant was then arrested, and this indictment was thereafter found against him. That the defendant intended to commit a crime is undisputed. I think the record shows an attempt to commit the crime of criminally receiving property as defined in sections 550 and 34 of the Penal Code, within the decisions of this court in People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, and People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741.

CULLEN, C. J., and GRAY, EDWARD T. BARLETT, VANN, and WERNER, JJ., concur with WILLARD BARTLETT, J. CHASE, J., dissents in memorandum.

Judgment of conviction reversed, etc.

SIMPSON v. STATE.

(Supreme Court of Alabama, 1877. 59 Ala. 1, 31 Am. Rep. 1.)

BRICKELL, C. J. The indictment contains a single count, charging, in the prescribed form, the defendant with an assault with intent to murder one Michael Ford.[4] * * * The offense charged must be proved, and an essential element of the present offense is not only an assault with intent to murder, but the specific intent to murder Ford, the person named in the indictment. If the intent was to murder another, or if there was not the specific intent to murder Ford, there cannot be a conviction of the aggravated offense charged, though there may be of the minor offense of assault, or of assault and battery. Barkus v. State, 49 Miss. 17, 19 Am. Rep. 1; Jones v. State, 11 Smedes & M. (Miss.) 315; Ogletree v. State, 28 Ala. 693; Morgan v. State, 33 Ala. 413; State v. Abram, 10 Ala. 928.

The intent cannot be implied as matter of law. It must be proved as matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. It is true the aggravated offense with which the defendant is charged cannot exist, unless, if death had resulted, the completed offense would have been murder. From this it does not necessarily follow that every assault from which,

[4] The statement of facts and part of the opinion are omitted.

if death ensued, the offense would be murder, is an assault with intent to murder, within the purview of the statute, or that the specific intent, the essential characteristic of the offense, exists. Therefore in Moore v. State, 18 Ala. 533, an affirmative instruction, "that the same facts and circumstances which would make the offense murder, if death ensued, furnish sufficient evidence of the intention," was declared erroneous. The court say: "There are a number of cases where a killing would amount to murder, and yet the party did not intend to kill. As if one from the housetop recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be, by the common law, murder; but if, instead of killing him, it inflicts only a slight injury, that party could not be convicted of an assault with intent to murder." Other illustrations may be drawn from our statutes: Murder in the first degree may be committed in the attempt to perpetrate arson, rape, robbery, or burglary, and yet an assault committed in such attempt is not an assault with intent to murder. If the intent is to ravish, or to rob, it is under the statute a distinct offense from an assault with intent to murder, though punished with the same severity. And at common law, if death results in the prosecution of a felonious intent, from an act malum in se, the killing is murder. As if A. shoot at the poultry of B., intending to steal them, and by accident kills a human being, he is guilty of murder. 1 Russ. Cr. 540. Yet, if death did not ensue, if there was a mere battery, or a wounding, it is not, under the statute, an assault with intent to murder. The statute is directed against an act done with the particular intent specified. The intent in fact is the intent to murder the person named in the indictment, and the doctrine of an intent in law different from the intent in fact has no just application; and if the real intent shown by the evidence is not that charged there cannot be a conviction for the offense that intent aggravates, and in contemplation of the statute merits punishment as a felony. Ogletree v. State, supra; Morgan v. State, supra. As is said by Mr. Bishop, the reason is obvious. The charge against the defendant is that, in consequence of a particular intent reaching beyond the act done, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed, and therefore to extract by legal fiction from this act such further intent, and then add it back to the act to increase its severity, is bad in law. 1 Bish. Cr. Law, § 514.

An application of these general principles will show that several of the instructions given by the city court were erroneous, and some of them misleading, or invasive of the province of the jury. The sixth asserts the familiar principle of the law of evidence that a man must be presumed to intend the natural and probable consequences of his acts, and from it draws the conclusion "that, if a man shoots another with a deadly weapon, the law presumes that by such shoot-

ing he intended to take the life of the person shot." Whether this instruction would or would not be correct, if death had ensued from the shooting and the defendant was on trial for the homicide, it is not now important to consider. In a case of this character the instruction is essentially erroneous, for, if it has any force, it converts the material element of the offense, the intent to murder a particular person, into a presumption of law, drawn from the nature of the weapon and the act done with it; while the intent is a fact which must be found by the jury, and the character of the weapon and the act done are only facts from which it may or may not be inferred. The weapon used, and the act done, may in the light of other facts and circumstances import an intent to maim, or merely to wound, distinct offenses from that imputed to the defendant; and maiming or wounding is a probable natural consequence of the act done with such weapon. * * *

The result is that the judgment of the city court is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

II. Solicitation [5]

COMMONWEALTH v. HUTCHINSON.

(Superior Court of Pennsylvania, 1898. 6 Pa. Super. Ct. 405.)

SMITH, J.[6] The defendant was convicted and sentenced on the charge of soliciting one Robert Williams to burn a store building. * *

It is contended, on the part of the defense, that solicitation to commit a misdemeanor is not indictable, and that, as the indictment charges only such solicitation, it sets forth no criminal offense.

There seems no question that solicitation to commit a felony is a misdemeanor. Rex v. Higgins, 2 East, 5; Rex v. Hickman, 1 Moody, 34; Reg. v. Quail, 4 F. & F. 1076; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; People v. Bush, 4 Hill (N. Y.) 133; Commonwealth v. McGill et al., Add. (Pa.) 21; State v. Bowers, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199, 28 Am. St. Rep. 847. This, however, cannot be affirmed of the broad proposition that solicitation to commit a misdemeanor is itself a misdemeanor On the contrary, it seems clear that with respect to various misdemeanors, involving little or no moral

[5] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 57.

[6] The statement of facts and part of the opinion are omitted.

turpitude or prejudice to society, solicitation to their commission is not in law an offense. It is equally clear that as to certain others it is an offense. The cases cited in Wharton's Criminal Law, § 179, show that such solicitations are indictable "when their object is interference with public justice, as when a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought, or is invited by the officer himself." In Rex v. Phillips, 6 East, 464, it was held that solicitation to commit a misdemeanor of an evil and vicious nature was indictable. The authorities collected in the notes to State v. Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. 434, 40 Am. St. Rep. 900, embrace cases in which it was held indictable to solicit another to make a plate for counterfeiting bills of exchange, to commit assault and battery, or to commit perjury. There is also a class of cases frequently referred to in the discussion of this question, but really without bearing on it: Solicitations accompanied with the offer of a bribe, of which Rex v. Plympton, 2 Ld. Raymond, 1377, and Rex v. Vaughan, 4 Burr. 2494, are leading instances. In these the act sought was lawful. The offer of a bribe to influence its performance was the unlawful feature.

The adjudications by the highest court of our own state, on the subject of solicitation to commit crime, touch it only at two points. They decide that it is a misdemeanor to solicit the commission of murder, Stabler v. Commonwealth, 95 Pa. 318, 40 Am. Rep. 653; Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; and that solicitation to commit fornication or adultery is not indictable, Smith v. Commonwealth, 54 Pa. 209, 93 Am. Dec. 686. The latter case does not, however, go to the length of declaring that solicitation to commit a misdemeanor is not a misdemeanor. No general rule on the subject was there laid down. The decision was based on the difficulty of defining the particular offense charged in the case, of determining "what expressions of the face or double entendres of the tongue, what freedom of manners, are to be adjudged solicitation," and on the principle that "a rule of law which should make mere solicitation to fornication or adultery indictable would be an impracticable rule, one that in the present usages and manners of society would lead to great abuses and oppressions." It may be added that the act charged was one that tended only to secret immorality by the parties immediately involved, and not directly to the public prejudice.

In the broad field lying between the extremes thus adjudicated, our guide must be found in the principles that underlie our Criminal Code. To reach just conclusions, we must pursue the method thus laid down by Mr. Justice Paxson in Commonwealth v. McHale, 97 Pa. 397, 39 Am. Rep. 808, and applied in that case: "We must look beyond the cases and examine the principles upon which common-law offenses rest. It is not so much a question whether such offenses have been

punished as whether they might have been. * * * We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is, not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."

The distinction, sometimes attempted, between solicitation to commit a felony and to commit a misdemeanor, is based on an artificial, and not an intrinsic, difference. It has received comparatively slight judicial recognition. In Reg. v. Ransford, 13 Cox, C. C. 9, it was declared to be without foundation. Indeed, the statutory classification of crime as felony or misdemeanor is governed by no fixed or definite principle, but is purely arbitrary. Legislative whim or caprice may alone determine in which category an offense, not a felony at common law, shall be placed. There is no reason, arising from the nature of the offenses, why the burning of another's house shall be classed as a felony, and the burning of one's own house or other building with intent to defraud insurers, as a misdemeanor; why the larceny of money shall be pronounced a felony, and its embezzlement only a misdemeanor; why it shall be deemed a felony to make counterfeit coin, and but a misdemeanor to utter it, or a felony to attempt to utter a counterfeit bank note, and only a misdemeanor to utter counterfeit coin; why the possession of ten counterfeit bank notes, with intent to utter them, shall be declared a felony, and the forgery of a deed merely a misdemeanor; or why the forgery of a bank check shall be made a felony, and the forgery of a promissory note but a misdemeanor. With respect to the public police and economy, and the general interests of society, there are misdemeanors more pernicious in effect than some of the felonies. As to the mode and incidents of trial there is no distinction, except as between offenses triable exclusively in the oyer and terminer and those within the jurisdiction of the quarter sessions. As to punishment, trial for misdemeanor may subject the defendant to punitive consequences more serious than those to which he is exposed in trial for many of the felonies, since the penalty is often more severe, and, even if acquitted, the costs may be imposed upon him. It is obvious that, with respect to the majority of criminal offenses, the distinction between felonies and misdemeanors rests on no substantial basis, and that the classification of an offense as a felony or a misdemeanor affords no just criterion for determining whether solicitation to its commission is indictable. Under such a test, one may be punished for soliciting the theft of the most trifling chattel, or the burning of the most worthless dwelling, yet may with impunity incite to the embezzlement of millions, or to the laying in ashes of the largest manufactories, or the entire business quarter of a city. The only practical and reasonable test is that stated and applied in Commonwealth v. McHale, supra—the manner in which the act may "affect the public police and economy"; and the only logical conclusion is

that all acts which "especially affect public society," to its injury, are criminal. The act for which the defendant is here indicted, as thus affecting public society, is the solicitation described in the indictment.

Argument is scarcely needed to demonstrate that the solicitation charged in the present case is of a character to injuriously affect public society and the public police and economy. Except solicitations to murder and riot, nothing is more calculated to disorder and terrorize society than incitements to incendiarism. Such incitement is a direct blow at security of property, and even of life. It must therefore be pronounced an indictable offense. * * *

The judgment of the court below is affirmed. * * *

III. Conspiracy[7]

Removed.

STATE v. BUCHANAN.

(Court of Appeals of Maryland, 1821. 5 Har. & J. 317, 9 Am. Dec. 534.)

This was an indictment charging the defendants in the second count with a conspiracy falsely, fraudulently, and unlawfully, by wrongful and indirect means to cheat, defraud, and impoverish the president, directors, and company of the Bank of the United States. To this indictment there was a demurrer that the matter contained in the indictment was not sufficient to sustain the prosecution. The county court ruled the demurrer good (Dorsey, C. J., dissenting), and discharged the defendants. The present writ of error was brought on the part of the state.

The case was argued in this court before CHASE, C. J., and BUCHANAN, EARLE, and MARTIN, JJ. * * *

CHASE, C. J.[8] * * * I think it may be assumed, as a position which cannot be controverted and is free from doubt, that the common law of England, as it was understood at the time of the Declaration of Rights, was the law of Maryland; and I think the position is equally clear that it must be ascertained by the writings of learned men of the profession and by the judicial records and adjudged cases of the courts of England.

[7] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 58–60.

[8] The indictment is abridged, and the opinion of Buchanan, J., and part of the opinion of Chase, C. J., are omitted.

The questions now occur: Do the facts contained in the indictment constitute the crime or offense of conspiracy? And is conspiracy an offense at common law, indictable and punishable as such?

Sergeant Hawkins, in his Pleas of the Crown, c. 72, in defining conspiracy at common law, makes use of strong and explicit language, and says there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person. This definition is corroborated and supported by adjudged cases in the courts of England, and especially in the Court of King's Bench.

In 1 Lev. 125, 1 Burns' Justice, 355, Rex v. Sterling and Others, Brewers of London, information for unlawfully conspiring to impoverish the excisemen by making orders that no small beer, called gallon beer, should be made for a certain time, etc., the whole court concurred in the opinion, and gave judgment for the king.

St. 33 Edw. 1, de conspiratoribus, was made in affirmance of the common law, and is a final definition of the instances or cases of conspiracy mentioned in it; but certainly it does not comprehend all the cases of conspiracy at the common law, which is most apparent from the adjudged cases of the courts of England on that subject.

I consider the adjudications of the courts of England, prior to the era of the independence of America, as authority to show what the common law of England was, in the opinion of the judges of the tribunals of that country, and since that time, to be respected as the opinions of enlightened judges of the jurisprudence of England.

The better opinion appears to be that a conspiracy to do an unlawful act is an indictable offense, although the object of the conspiracy is not executed. In this case the conspiracy to cheat, defraud, and impoverish the Bank of the United States, by appropriating the moneys, promissory notes, and funds of the bank to the use of the accused, has been proved by the admission and confession of the defendants, and a consummation of all the overt acts has been fully established.

The Poulterer's Case, 9 Coke, 56, 57: The falsa alligantia is a false binding, each to the other, by bond or promise to execute some unlawful act. Before the unlawful act executed, the law punishes the coadjunction, confederacy, or false alliance, to the end to prevent the unlawful act. "Quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud. Et effectus punitur licet non sequatur effectus." And in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief and the innocent from suffering it. The defendants were punished by fine and imprisonment.

I think it is established by the decisions of the courts of England that a conspiracy to cheat is an offense indictable and punishable at common law. Rex v. Wheatly, 2 Burr. 1125. A cheat or imposition

by one person only is not indictable at common law, but a conspiracy to cheat by two or more is indictable at common law, because ordinary care and caution is no guard against it. Indictment against Macarty and others, for a combination to cheat in imposing on the prosecutor stale beer mixed with vinegar for port wine. 6 Mod. 301. Indictment against Cope and others, for a conspiracy to ruin the trade of the prosecutor by bribing his apprentices to put grease into the paste, which had spoiled his cards. 1 Strange, 144. Indictment against Kinnersley and Moore, for a conspiracy to charge Lord Sunderland with endeavoring to commit sodomy with said Moore, in order to extort money from Lord Sunderland. The whole court gave judgment in support of the indictment, and punished Kinnersley by fine, imprisonment, etc., and sentenced Moore to stand in the pillory, suffer a year's imprisonment, and to give security for his good behavior. 1 Stra. 193, 196. Indictment against Rispal, 3 Burr. 1320: The indictment sets forth that Rispal and two others did wickedly and unlawfully conspire among themselves falsely to accuse John Chilton with having taken a quantity of human hair out of a bag, etc., for the purpose of exacting and extorting money from the said John Chilton. The court were of opinion that the indictment was well laid, and that the gist of the offense is the unlawful conspiring to injure Chilton by this false charge.

A combination among laborers or mechanics to raise their wages, is a conspiracy at common law, and indictable (8 Mod. 10), although lawful for each separately to raise his wages.

I consider the doctrine so firmly established by the decisions of the courts of England, prior to the era of our independence, that a combination or confederacy to do an unlawful act is a conspiracy indictable and punishable at common law, that I have deemed it unnecessary to refer to all the cases relative to this question, and therefore have contented myself with citing some of those which appear to me most opposite.

The opinion of Lord Ellenborough in Rex v. Turner and Others, 13 East, 230, does not impugn, but strongly sanctions and confirms, this doctrine. He says the cases of conspiracy have gone far enough. He should be sorry to push them still further. The charge in the indictment was for committing a civil trespass. He also says all the cases in conspiracy proceed on the ground that the object of the conspiracy is to be effected by some falsity.

I am of opinion that the judgment be reversed, and the demurrer overruled.

Judgment reversed.

Oct. 17th 1924.

OFFENSES AGAINST THE PERSON

I. Homicide in General [1]

approved.

PEOPLE v. LEWIS.

(Supreme Court of California, 1899. 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.)

TEMPLE, J.[2] The defendant was convicted of manslaughter, and appeals from the judgment and from an order refusing a new trial. * * * Defendant and deceased were brothers-in-law, and not altogether friendly, although they were on speaking and visiting terms. On the morning of the homicide the deceased visited the residence of the defendant, was received in a friendly manner, but after a while an altercation arose, as a result of which defendant shot deceased in the abdomen, inflicting a wound that was necessarily mortal. Farrell fell to the ground, stunned for an instant, but soon got up and went into the house, saying: "Shoot me again; I shall die anyway." His strength soon failed him, and he was put to bed. Soon afterward, about how long does not appear, but within a very few minutes, when no other person was present except a lad of about nine years of age, nephew of the deceased and son of the defendant, the deceased procured a knife and cut his throat, inflicting a ghastly wound, from the effect of which, according to the medical evidence, he must necessarily have died in five minutes. The wound inflicted by the defendant severed the mesenteric artery, and medical witnesses testified that under the circumstances it was necessarily mortal, and death would ensue within one hour from the effects of the wound alone. Indeed, the evidence was that usually the effect of such a wound would be to cause death in less time than that, but possibly the omentum may have filled the wound, and thus, by preventing the flow of the blood from the body, have stayed its certain effect for a short period. Internal hemorrhage was still occurring, and, with other effects of the gunshot wound, produced intense pain. The medical witnesses thought that death was accelerated by the knife wound. Perhaps some of them considered it the immediate cause of death.

Now, it is contended that this is a case where one languishing from a mortal wound is killed by an intervening cause, and, therefore, de-

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 61, 62.

[2] Part of the opinion is omitted.

ceased was not killed by Lewis. To constitute manslaughter, the defendant must have killed some one, and if, though mortally wounded by the defendant, Farrell actually died from an independent intervening cause, Lewis, at the most, could only be guilty of a felonious attempt. He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course and left Farrell unwounded. And they contend that the intervening act was the cause of death, if it shortened the life of Farrell for any period whatever.

The Attorney General does not controvert the general proposition here contended for, but argues that the wound inflicted by the defendant was the direct cause of the throat cutting, and, therefore, defendant is criminally responsible for the death. He illustrates his position by supposing a case of one dangerously wounded and whose wounds had been bandaged by a surgeon. He says: Suppose through the fever and pain consequent upon the wound the patient becomes frenzied and tears away the bandage and thus accelerates his own death. Would not the defendant be responsible for a homicide? Undoubtedly he would be, for in the case supposed the deceased died from the wound, aggravated, it is true, by the restlessness of the deceased, but still the wound inflicted by the defendant produced death. Whether such is the case here is the question.

The Attorney General seems to admit a fact, which I do not concede, that the gunshot wound was not, when Farrell died, then itself directly contributory to the death. I think the jury were warranted in finding that it was. But if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely the occasion upon which another cause intervened, not produced by the first wound or related to it in other than a casual way, then defendant is guilty of a homicide. But, if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. In such case, I think, it would be true that the defendant was thus prevented from killing.

The case, considered under this view, is further complicated from the fact that it is impossible to determine whether deceased was induced to cut his throat through pain produced by the wound. May it not have been from remorse, or from a desire to shield his brother-in-law? In either case the causal relation between the knife wound and the gunshot wound would seem to be the same. In either case, if defendant had not shot the deceased, the knife wound would not have been inflicted.

Suppose one assaults and wounds another, intending to take life, but the wound, though painful, is not even dangerous, and the wounded man knows that it is not mortal, and yet takes his own life to escape pain, would it not be suicide only? Yet, the wound inflicted by the assailant would have the same relation to death which the original wound in this case has to the knife wound. The wound induced the suicide, but the wound was not, in the usual course of things, the cause of the suicide.

Though no case altogether like this has been found, yet, as was to have been expected, the general subject has often been considered. In 1 Hale's Pleas of the Crown, 428, the law is stated. So far as material here, his views may be thus summarized: (1) If one gives another a dangerous wound, which might by very skillful treatment be cured, and is not, it is a case of homicide. (2) If one inflicts a dangerous wound, and the man dies from the treatment, "if it can clearly appear that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must appear clearly and certainly to be so." (3) If one receives a wound, not in itself mortal, and fever or gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide; "for that wound, though it was not the immediate cause of his death, yet it was the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is causa causati." (4) One who hastens the death of a person languishing with a mortal disease is guilty of a homicide; for the death is not merely by a visitation of Providence, but the hurt hastens it and the wrongdoer cannot thus apportion the responsibility, et cetera. It would make no difference, I presume, if the person killed was languishing from a mortal wound, rather than from an ordinary disease.

In State v. Scates, 50 N. C. 420, a child was found dead, badly burned, and with a wound from a blow on the head. The burning was admitted by defendant, but the blow was not, and it was not proven who inflicted it. The medical witness thought the burning was the primary cause of death, but the blow may have hastened it. The jury was told that if it was doubtful which was the immediate cause of death they must acquit, but if they found that the burning was the primary cause of death and the blow only hastened it they could convict.

The case was reversed, the appellate court holding that the blow might have been the independent act of another, and, if it hastened the death, it, and not the burning, was the cause of death.

In Bush v. Commonwealth, 78 Ky. 268, the deceased received a wound not necessarily mortal, and, in consequence, was taken to a hospital, where she took scarlet fever from a nurse and died of the fever. The court said: "When the disease is a consequence of the

wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, the death is by visitation of Providence, and not from the act of the party inflicting the wound. * * * If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility."

The last case, in my opinion, so far as it goes, correctly states the law. The facts of this case do not bring it strictly within any of the propositions found in Hale's Pleas of the Crown. The second and third propositions both predicate a wound not necessarily mortal. What the law would have been in the second case, had the wound been mortal and the applications had hastened the death, is not stated. It seems to me, however, the case of a person already languishing from a mortal wound is precisely that of one suffering from a mortal disease. Certainly the willful and unlawful killing of such a person would be a felony, and it cannot be true that the first offender and the last can each be guilty of murdering the same man—if they had no connection with each other, and both wounds were not actively operating to produce death when it occurred.

But why is it that one who inflicts a wound not mortal is guilty of a homicide, if through misconduct of the patient or unskillful treatment gangrene or fever sets in, producing a fatal termination, when, if it can be clearly made to appear that the medicine and not the wound was the cause of the death, he is not guilty of a homicide? In each case if the wound had not been, the treatment would not have been, and the man would not then have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death, and in the other it merely contributed to it. In one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, though the occasion of the treatment did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Take, for instance, the giving of a dose of morphine, by mistake, sufficient to end life at once. In such case it is as obvious that the treatment produced death as it would have been had the physician cut off his patient's head. But see People v. Cook, 39 Mich. 236, 33 Am. Rep. 380. In this case it appears that defendant had inflicted a dangerous wound, but it was contended by the defense that death was caused by an overdose of morphine. Defendant asked an instruction as follows: "If the jury believe that the injury inflicted by the prisoner would have been fatal, but if death was actually produced by morphine poisoning,

they must acquit." The instruction was refused, but the jury were told that if the wound was not in itself mortal, and death was caused solely by the morphine, they must acquit. The action of the trial court was sustained, on the ground that a mortal wound had been given which necessitated medical treatment, that the physicians were competent and acted in good faith, and that it was not made clearly to appear that the morphine solely produced death, and that the wound did not at all contribute to the death at that time. Under the authorities this was equivalent to the finding that the wound did not contribute to the death.

This case differs from that in this: That here the intervening cause, which it is alleged hastened death, was not medical treatment designed to be helpful, and which the deceased was compelled to procure because of the wound, but was an act intended to produce death and did not result from the first wound in the natural course of events. But we have reached the conclusion by a course of argument unnecessarily prolix, except from a desire to fully consider the earnest and able argument of the defendant, that the test is—or at least one test—whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out. Here, when the throat was cut, Farrell was not merely languishing from a mortal wound. He was actually dying—and after the throat was cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event. If the throat cutting had been by a third person, unconnected with the defendant, he might be guilty; for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed; but, if he is dying from a wound given by another, both may properly be said to have contributed to his death. * * *

The court refused to instruct the jury as follows: "If you believe from the evidence that it is impossible to tell whether Will Farrell died from the wound in the throat or the wound in the abdomen, you are bound to acquit." The instruction was properly refused. It assumed that death must have resulted wholly from one wound or the other, and ignored the proposition that both might have contributed, as the jury could have found from the evidence. * * *

The judgment is affirmed.

McFARLAND and HENSHAW, JJ., concurred.

Hearing in banc denied.

II. Justifiable Homicide [3]

STOREY v. STATE.

(Supreme Court of Alabama, 1882. 71 Ala. 329.)

SOMERVILLE, J.[4] * * * The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less a felonious homicide. Street v. Sinclair, 71 Ala. 110; Burns v. Campbell, Id. 271.

Taking the hypothesis that there was a larceny of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a felony in this state, being specially made so by statute, without regard to the value of the animal stolen. Code 1876, § 4358. The fifth charge requested by the defendant is an assertion of the proposition that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute—a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common-law jurisprudence.

The broad doctrine intimated by Lord Coke was that a felon may be killed to prevent the commission of a felony without any inevitable cause, or as a matter of mere choice with the slayer. 3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be that "where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting." 4 Com. 181. The reason he assigns is that the law is too tender of the public peace

[3] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 65.

[4] The statement of facts and part of the opinion are omitted.

and too careful of the lives of the subjects to "suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death."

It must be admitted that there was far more reason in this rule than the one intimated by Lord Coke, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing cannot be done from mere choice; and it is none the less certain that the felony need not be a capital one to come within the scope of the rule. Gray v. Combs, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431; Cases on Self-Defense (Horr. & Thomp.) 725, 867; Oliver v. State, 17 Ala. 587; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282.

We find it often stated, in general terms, both by text-writers and in many well-considered cases, that one may, as Mr. Bishop expresses it, "oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence." 1 Bish. Cr. Law, §§ 849, 850; State v. Rutherford, 8 N. C. 457, 9 Am. Dec. 658. It is observed by Mr. Bishop, who is an advocate of this theory, that "the practical carrying out of the right thus conceded is in some circumstances dangerous, and wherever admitted it should be carefully guarded." 1 Bish. Cr. Law, § 855.

After a careful consideration of the subject we are fully persuaded that the rule as thus stated is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force. Wharton on Hom. § 539. Mr. Greenleaf confines it to "the prevention of any atrocious crime attempted to be committed by force, such as murder, robbery, house-breaking in the nighttime, rape, mayhem, or any other act of felony against the person" (3 Greenl. Ev. 115); and such seems to be the general expression of the common-law text-writers (1 Russ. Cr. 665–670; 4 Black. Com. 178–180; Whart. Amer. Cr. Law, 298–403; 1 East, P. C. 271; 1 Hale, P. C. 488; Foster, 274). It is said by the authors of Cases on Self-Defense, that a killing which "appears to be reasonably necessary to prevent a forcible and atrocious felony against property is justifiable homicide." "This rule," it is added, "the common-law writers do not extend to secret felonies, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defense of property does not extend to cases of larceny, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value." Cases on Self-Defense (Horr. & Thomp.), 901, 902. This was settled in Reg. v. Murphy, 2 Crawf.

& Dix, C. C. 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor; the shooting being done very clearly to prevent the act, which was admitted to be a felony. Doherty, C. J., said: "I cannot allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offenses for which the law has provided milder penalties." This view is supported by the following cases: State v. Vance, 17 Iowa, 144, McClelland v. Kay, 14 B. Mon. (Ky.) 106, and others not necessary to be cited. See Cases on Self-Defense, p. 901, note. * * *

It cannot be questioned, however, that if there was in truth a larceny of the prisoner's horse, he or any other private person had a lawful right to pursue the thief for the purpose of arresting him and of recapturing the stolen property. Code 1876, §§ 4668-4670; 1 Bish. Cr. Proc. §§ 164, 165. He is not required in such case to inform the party fleeing of his purpose to arrest him, as in ordinary cases. Code 1876, § 4669. And he could, if resisted, repel force with force, and need not give back or retreat. If under such circumstances the party making resistance is unavoidably killed, the homicide would be justifiable. 2 Bish. Cr. Law, § 647; 1 Russ. Cr. 665; State v. Roane, 13 N. C. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretense of pursuit as a mere colorable device beneath which to perpetrate crime. * * *

There are some other questions raised in the record which we do not think necessary to discuss. The judgment of the circuit court must be reversed, and the cause remanded for a new trial. In the meanwhile the prisoner will be retained in custody until discharged by due process of law.

CARROLL v. STATE.

(Supreme Court of Alabama, 1853. 23 Ala. 28, 58 Am. Dec. 282.)

GOLDTHWAITE, J.[5] We will first consider the questions presented by the refusal of the court to give the charge requested. * * *

A mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespasses with force it may be murder or manslaughter, according to the circumstances. The owner may resist the entry,

[5] The statement of facts and part of the opinion are omitted.

but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter, and if done with malice, express or implied, it is then murder.

The rule as to the extent of protection to the dwelling being ascertained, there is but little difficulty in its application to the facts as stated upon the record. It is conceded most fully that, if the evidence shows an assault upon the house or the person under circumstances which would create a reasonable apprehension—that is, a just apprehension in the mind of a reasonable man—of the design to commit a felony with force, or to inflict a personal injury which might result in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, and over whose person or property such danger is impending, may lawfully act upon appearances and kill the assailant. The law in such a case would not require that the danger should be real, that the peril should actually exist; but it does require that the appearances should be such as would excite a reasonable apprehension of such peril, and if such appearances do not exist the killing would be either murder or manslaughter.

Assuming, therefore, that the deceased came to his death by the act of the prisoner, and by the use of a deadly weapon, and in the aspect of the case as presented by the charge requested, the question is simply whether the act was done under the necessity, real or apparent, which the law requires. If it was not, it follows necessarily that the prisoner was guilty either of murder or manslaughter; and, if there was any evidence which tended to show that such necessity existed, the charge requested should have been given. Without referring to the evidence in detail, it is sufficient to observe that the bill of exceptions shows that none was offered of any act of violence on the part of the deceased, either in making the entry into the house, or after it had been made, unless the entry itself, after he had been warned not to enter, might be regarded as an act of violence. When the law speaks of a forcible trespass, it means such a trespass as would amount to a breach of the peace. Entering the house after a warning had been given would have aggravated the trespass; but, if done without force, it would not have been a breach of the peace. The whole evidence, therefore, consisted of the previous threats made by the deceased and the trespass committed by him. The threats, however, did not change the character of the trespass and convert it into a trespass with force. We have seen that, although a forcible trespass upon the dwelling-house may in some cases authorize the killing of the assailant, yet it is not every invasion even of this character upon a man's dwelling which will reduce the killing to manslaughter. The charge requested refer-

red solely to the right of the prisoner to protect the possession of his house, and the circumstances, therefore, must tend to prove a reasonable apprehension on his part of the existence of such a state of facts as would relieve him from the crime of murder. Taken in connection with the evidence, then, the charge asserted the proposition that, where the evidence established only a trespass without force, it tended to create a reasonable apprehension, not only that it was committed with force, but under such circumstances as would be sufficient to reduce the killing to manslaughter. We think there was no error in the refusal of this charge. * * *

There is no error in the record, and the judgment is affirmed.

STATE v. MORGAN.

(Supreme Court of North Carolina, 1842. 25 N. C. 186, 38 Am. Dec. 714.)

GASTON, J.[a] * * * Assuming, then, that the constable had wrongfully taken the gun, and that the defendant had a right to require its return, and that exertion of force, nothing short of that which was begun on the part of the defendant, would have availed to compel its return, in our opinion the assault is not justified. It was made with a deadly weapon, which, if used, would have probably occasioned death, and made without any previous resistance on the part of the officer. It was, therefore, an assault with intent to kill. If this intent were lawful, the assault with that intent was lawful. If this intent were unlawful, an assault with that intent cannot stand justified. Now, when it is said that a man may rightfully use as much force as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification: that he shall not, except in extreme cases, endanger human life or do great bodily harm.

It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed, by extreme remedies. There is a recklessness, a wanton disregard of humanity and social duty, in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong, which is essentially wicked, and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. Thus an officer, acting under a legal process, has a right to arrest the person against whom it is directed, and retake him, if he break

[a] The statement of facts and part of the opinion are omitted.

custody; and for such purpose he may and ought to use necessary force. Yet, if the process be in a civil case, or for a misdemeanor only, and the officer, although he cannot otherwise arrest or retake his prisoner, intentionally kills him, it is murder. 1 Hale, 481; Foster, 271; 1 East, P. C. c. 5, §§ 306, 307. The purpose is indeed rightful, but it is not one of such paramount necessity as to justify a resort to such desperate means. So it is clear that if one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide; not because he could take life to save property, but he might take the life of the assailant to save his own.

If these principles be right, and we think they cannot be contested, it would follow that, if unfortunately the rage of the defendant in this case had not been pacified, and the fatal blow had fallen and death ensued, it would have been a clear case of murder. If so, then the assault made was an assault with intent to commit murder. A justifiable assault with intent to commit murder is a legal solecism.

This opinion must be certified to the superior court of Henderson, with instructions to render judgment for the state upon the special verdict.

PER CURIAM. Ordered accordingly.

MORRISON v. COMMONWEALTH.

(Court of Appeals of Kentucky, 1903. 74 S. W. 277, 24 Ky. Law Rep. 2493.)

HOBSON, J.[1] * * * The case comes to this: Did Morrison, when he saw Alex Dean committing an assault on his sister, and pushing or striking her against the house, have a right to intervene between the brother and sister for her protection from a simple battery? In 1 Bishop on Criminal Law, § 877, it is said: "The doctrine here is that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feebler. But a guest in the house may defend the house, or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." This statement of the law, as applied to simple batteries and breaches of

[1] Part of the opinion is omitted.

the peace, is broader than it is usually put in the authorities. Thus, in 3 Bl. Com. 3, it is said: "The defense of one's self, or the mutual and reciprocal defense of such as stand in relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these, his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray." In a note to this it is added: "When a person does not stand in either of these relations, he cannot justify an interference on behalf of the party injured, but merely as an indifferent person to preserve the peace." See, to the same effect, 2 Am. & Eng. Enc. Law, p. 981; 2 Roberson, Criminal Law, § 543.

When a felony is apparently about to be committed, as where there is apparent danger of loss of life by the person assailed, or of great bodily harm to him, a different rule prevails, and there any third person may lawfully intervene for his protection, using such means for his defense as the person assaulted himself may lawfully use. But where the assault is not felonious, and the person intervening does not stand in any of the relations to the one assaulted excepted out of the common-law rule, then he who intervenes can only act for the preservation of the peace. He cannot come into the difficulty for the purpose of taking the place of the person assailed and continuing the fight. This is the common-law rule, as we understand the authorities, and we cannot depart from it or extend it.

It is conceded on all hands that Morrison ran down on tiptoe to where Alex Dean and his sister were, some 90 feet away. If, when he got there, he at once stabbed Dean in the back, as stated by the witnesses for the commonwealth, he was the aggressor. The instruction of the court, which submitted to the jury the question whether Morrison believed, or had reasonable grounds to believe, himself in danger of death or great bodily harm at the hands of Dean, when he stabbed him, was more favorable to Morrison than the law warranted, as the court did not submit to the jury the question whether Morrison was the aggressor. Morrison knew that the illicit relations between him and Ida Dean were the foundation of the animosity of Alex Dean to him. He also knew that this was the cause of the quarrel between the brother and sister. With this knowledge he ran on tiptoe down to where they were, armed with a dirk; and if, as he says, he caught Alex Dean by the shoulder and shoved them apart, saying to him, "You can't beat her where I am," his interference was not as an indifferent person to preserve the peace, for his first act was to commit a battery on Alex Dean by taking him by the shoulder, and this was followed up by a declaration which he could but know, under all the circumstances, would make Alex Dean regard him as an assailant. To hold that he intervened, under the evidence, as an indifferent person to preserve the peace, would be to give no real effect to the common-

law rule allowing greater rights to parent and child, husband and wife, master and servant, or the like, than to other persons in cases of simple batteries or breaches of the peace. According to his own testimony, the manner of his approach, his conduct on reaching Alex Dean, and his declaration to him, under the circumstances, were not those of one bent on peace, but of one proposing to champion the woman and fight her battles for her. He was, therefore, the aggressor, and the court did not err in refusing to admit the proof as to the bad character of Alex Dean or his previous threats; and this evidence, if admitted, could not have been of material service to the defendant under the view of the law which we have indicated, for the jury might have inferred that, when he interfered with knowledge of the previous threats and the character of Dean, he anticipated the result that ensued.

The verdict of the jury finding him guilty of manslaughter, and fixing his punishment at 11 years in the penitentiary, seems to have been due to their accepting the version of the transaction as given by the witnesses for the commonwealth, and their believing that Morrison acted in sudden heat on seeing the woman assailed by her brother. Judgment affirmed.

NUNN, J., dissents.

III. Excusable Self-Defense[a]

GOODALL v. STATE.

(Supreme Court of Oregon, 1861. 1 Or. 333, 80 Am. Dec. 396.)

BOICE, J.[b] * * * The next question in this case arises on the several instructions of the judge as to what would justify the taking of life in self-defense, and all there is on the subject in the instructions may be considered together. After instructing the jury in the language of the statute, the court said: "To justify a killing in self-defense it was necessary that an assault should have been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting." The court also said that "the having a drawn pistol in his hand by deceased would not be enough, although deceased had threatened to take the life of the prisoner, and these threats had been communicated to him."

I understand, by these instructions, that the court held the law

[a] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 68.

[b] The statement of facts and part of the opinion are omitted.

to be that an actual assault with the pistol was necessary to justify the killing, which means that there must have been on the part of the deceased an attempt to shoot the prisoner, and until such attempt was made the prisoner would not have been justified in acting on the defensive and in shooting the deceased, although deceased appeared before him with a drawn pistol and had threatened his life. If such be the law, then there is no such thing as available self-defense—when the assailant makes his attack with a pistol or other kind of firearm; for the assault and discharge of the weapon are simultaneous, or so nearly so, that resistance would be almost impossible. Suppose A., who has threatened the life of B., appears to B. suddenly, at the house of the latter, at an unusual place, armed with a gun, and in a threatening attitude, and B., induced by the previous threats and unusual appearance of his adversary, and believing his own life in imminent danger, and having himself a pistol, shoots A. and kills him, before A. actually makes an attempt to level his gun. Would this be murder? I think not. Such a case, unchanged by other evidence than the killing, would lack all indications of malicious intent, which is necessary to constitute murder.

If B. under such circumstances, acting from appearances, and believing that he was in actual and imminent danger of death or great bodily harm, should kill A., I think he would be justified. By the common law one acting from appearances in such a case, and believing the apparent danger imminent, would be justified, though it afterwards turned out that there was no real danger, and that the gun of the assailant was only loaded with powder. This is, certainly, as strong a case for justification as when one, alarmed in the night by the cry of thieves, rushes forth in the dark, and by mistake kills an innocent person; and in such a case the slayer would be excused at common law. Such was the dictum in the Levett Case, which has been approved by the English commentators. 1 East, P. C. 274; 1 Russell on Crimes, 669.

In the case before us there was evidence tending to show that when the prisoner first saw deceased, at the time the fatal shots were discharged, deceased had a pistol in his hand and was standing on the doorstep of the prisoner's private room which was an unusual place for one who had threatened the prisoner's life, and whom he considered his enemy. And I think the court should have instructed the jury that if they believed, from the evidence in the case, that there was reasonable ground for Goodall to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and, acting on such belief, killed the deceased, he was excusable, and that it was not necessary that he should wait until an assault was actually committed.

The whole doctrine of self-defense was most ably examined and illustrated in the case of Thomas O. Selfridge, tried in the Supreme

Court of Massachusetts; and the doctrines of that case were adopted in the state of New York in the case of Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, where it is declared by Bronson, J., in speaking of the same case, "that when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." "To this doctrine," says the learned judge, "I fully subscribe. A different rule would lay too heavy a burden on poor humanity." He further says that the authority of the Selfridge Case was followed by the revisors in framing the statutes of New York touching this question. And our statute is a copy of the New York statute, and, if the doctrine is properly applicable there, then it is applicable here also.

As to what will constitute reasonable grounds of belief in such cases, sufficient to justify taking life, must depend, to a considerable extent, on the circumstances of each particular case. And the reasonableness of the appearances under which a party claims to justify may very properly be left to a jury, under the instructions of the court. And I think it is going too far to lay down the general rule that an actual assault must be committed; for such a rule would take away, or at least render almost unavailable, the right of self-defense when firearms are used.

It is also assigned as error that the court instructed the jury "that, killing being admitted by the accused, it devolved on him to prove that he was justifiable." I think this instruction in conformity with the common law; but it is not necessary to examine the common-law authorities on this subject, for our statute, in the fourth section of the third chapter, provides: "There shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first or second degree." This, I think, is conclusive on this subject; for it was the evident intention of the Legislature, by this statute, to impose on the prosecution some further burden than the mere proof of the killing to establish the malice, which, under our statute, is not to be presumed from the mere proof of the killing, and I think the instruction of the court was error.

There is another ground of error assigned, which is that the court erred in permitting the declarations of Potts to be given in evidence, made to his son prior to the killing, and declaring the reason why he was going to the house of Aldrich, where he was killed. I think this evidence was improperly admitted, and that the only declarations of the deceased which are competent are dying declarations, or those which are a part of the res gestæ.

Judgment is reversed.

Reversable error for the trial court to have charged subject of escape or retreat

Reversed - New trial ordered.

STATE v. GARDNER.

(Supreme Court of Minnesota, 1905. 96 Minn. 318, 104 N. W. 971. 2 L. R. A. [N. S.] 49.)

JAGGARD, J.,[10] * * * delivered the opinion of the court.

The assignments of error raise many questions as to the correctness of the charge of the court. The court charged, inter alia: "But to justify the taking of human life in self-defense it must appear from all the evidence that the defendant not only really and in good faith endeavored to avoid an encounter and to escape from his assailant before the fatal shot was fired. * * * The right to defend himself by taking the life of his assailant would not arise until the defendant had at least attempted to avoid the necessity of such an act; but in this connection I also charge you that when he is assailed or threatened he is not necessarily bound to retreat, and whether, under the circumstances of this case, the defendant was justified in doing what he did, is a matter for you to determine, and not for the court to decide." We are of the opinion that this charge was erroneous in itself (Perkins v. State, 78 Wis. 551, 47 N. W. 827; Shell v. State, 88 Ala. 14, 7 South. 40), and was not applicable to the facts proved. The common-law doctrine of "retreat to the wall" is thus referred to in a frequently quoted paragraph from Coke (3 Inst. 55): "Some be voluntary, and yet being done upon an inevitable cause are no felony; as if A. be assaulted by B., and they fight together, and before any mortal blow given, A. giveth back until he cometh unto a hedge, wall, or other strait, beyond which he cannot pass, and then, in his own defense, and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony." The rule on this subject has tended in some American jurisdictions to be enforced with strictness; in others, to be largely modified, in accordance with changed conditions, and, indeed, to be positively relaxed. See State v. Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 598; Runyan v. State, 57 Ind. 80, 84, 26 Am. Rep. 52. In a leading case (Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733), after a review of the common-law authorities, in consequence of this confusion in the later cases, the court, inter alia, said: "The question then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an as-

Error Good Ins.

[10] The statement of facts and part of the opinion are omitted.

sailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm." The Supreme Court of the United States approved of this rule and of Runyan v. State, supra, in 1895, in Beard v. United States, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086. * * *

In Rowe v. United States, 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547, the defendant, a Cherokee Indian, had an altercation with the deceased at a hotel. After a quarrel at the supper table the accused swore at the deceased and kicked him. The accused then leaned up against the counter, as if, according to his own testimony, he had abandoned the controversy. Immediately the deceased sprang at him with a knife, cutting him. Thereupon the accused shot and killed his assailant. The trial court charged in a carefully qualified way as to the duty of retreat. Mr. Justice Harlan, inter alia, said: "The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm; and, under the circumstances, it was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him." This accords with the general law on the subject. Harbour v. State, 140 Ala. 103, 37 South. 330; People v. Newcomer, 118 Cal. 263, 50 Pac. 405; State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; Babcock v. People, 13 Colo. 515, 22 Pac. 817; Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Commonwealth v. Selfridge (1806; Mass.) Horr. & T. Cas. 1; Pond v. People, 8 Mich. 150; People v. Macard, 73 Mich. 15, 40 N. W. 784; State v. Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; Willis v. State, 43 Neb. 102, 61 N. W. 254; 25 Am. & Eng. Enc. Law (2d Ed.) p. 272, note 2.

The rule of law in this state is not inconsistent with this conception of the duty to retreat so far as is involved in the case at bar. * * *

The doctrine of "retreat to the wall" had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute or by

judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.

In the case at bar one of the theories of the state was that the defendant shot Garrison while he was at work leaning over the poles. In this view the charge as to escape was not involved, and the subject should not have been referred to. It became relevant only in the consideration of the defendant's narrative of the tragedy. According to that narrative the accused knew of the threats made by Garrison to kill him. Garrison was only 30 feet away from his rifle, leaning against the house or a log. Defendant had more than 100 paces to travel before he could reach the poplars surrounding Garrison's curtilage. An attempted retreat finally must have resulted in exposing him to a duel with a dead shot like Garrison. It would not have been reasonable to have required him to have undertaken to reach and take Garrison's gun. Garrison, the larger man, would, as he said, have broken him in two before he could have secured it and protected himself. It was apparently as dangerous for him to retreat as to stand his ground. Duncan v. State, 49 Ark. 543, 547, 548, 6 S. W. 164. To use the expression of Chief Justice Gilfillan, referred to, if the jury believed the defendant's narrative, he had no "practicable means to avoid threatened harm by an attempt to escape or retreat. He had no reasonable way open to retreat without increasing his peril." Harbour v. State, supra. He had "come to a strait." Coke, Inst. supra. The fact that Gardner carried his gun did not justify giving the instruction. His contention was that this was in accordance with a natural and the general custom of the wild and unsettled wilderness in which he lived. Moreover, as was held in People v. Macard, supra, a person knowing his life to be threatened and believing himself to be in danger of death or great bodily harm, is not obliged to remain at home in order to avoid an assault, but may arm himself sufficiently to repel anticipated attack and pursue his legitimate avocation; and if, without fault, he is compelled to take life to save himself, he may use any weapon he may have secured for that purpose, and the homicide is excusable. And see Bohannon v. Commonwealth, 8 Bush (Ky.) 481, 8 Am. Rep. 474. It was accordingly reversible error, in any view of the case, for the trial court to have charged upon the subject of escape or retreat. * * *

The judgment and order appealed from are reversed, and, in accordance with section 7391, Gen. St. 1894, a new trial is directed. * * *

New Trial granted.

PEOPLE v. BUTTON.

(Supreme Court of California, 1895. 106 Cal. 628, 39 Pac. 1073, 28 L. R. A. 591, 46 Am. St. Rep. 259.)

GAROUTTE, J.[11] The appellant was charged with the crime of murder, and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial.

For the perfect understanding of the principle of law involved in this appeal it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material contradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor more or less —the defendant to some extent, and the deceased to a great extent. The deceased was lying on the ground, with his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries were so serious as likely to produce in the injured man a dazed condition of mind impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault the defendant went some distance from the camp, secured his horse, returned, and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from 5 to 15 minutes. The deceased's conduct and situation during the absence of defendant is not made plain by the evidence, but he was probably still lying where assaulted. At this period of time, the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun and attempted to shoot the defendant, and then was himself shot by the defendant and immediately died. There is also some further evidence that deceased ordered his dog to attack the defendant, and that defendant shot at the dog; but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts the court charged the jury as to the law of the case, and declared to them in various forms the principle of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the

[11] Part of the opinion is omitted.

same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat." * * *

Knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him and that all fear of further harm is groundless. Yet, in considering this question the assailed must be deemed a man of ordinary understanding. He must be gauged and tested by the common rule—a reasonable man. His acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked. Again, the party attacked must also act in good faith. He must act in good faith toward the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see he must see, and if he has ears to hear he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear, he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray, it must be conceded that the deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant he thought he was acting in self-defense, and according to his lights he was acting in self-defense. To be sure, those lights, supplied by a vacant mind, were dim and unsatisfactory, yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant, in furnishing them, forcibly and unlawfully deprived the deceased of

others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offense. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons we consider that the defendant cannot be held guiltless.

Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill was brought upon himself. 1 Hawkins' Pleas of the Crown, 87. While the humane doctrine, and especially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that under the circumstances here presented the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a person naturally non compos, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer. He was the only wrongdoer. He brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was non compos by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case, all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances he left no room in his case for the plea of self-defense. * * *

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

BEATTY, C. J., and HARRISON, MCFARLAND, and VAN FLEET, JJ., concurred.

IV. Murder—Malice Aforethought [12]

PENNSYLVANIA v. HONEYMAN.

(County Court of Allegheny, 1793. Add. [Pa.] 147.)

Honeyman was indicted for the murder of Benjamin Askins, on 23d November, 1793. Askins, Honeyman, and two others, Ward and Faris, had been drinking together, and were dancing in Askins' house. Ward shoved Faris, who complained of it. Ward asked if he resented it. Askins said if he did not, he would; and he threw off his clothes, and struck at Ward, who kept off the blow, and left the house. Honeyman called after him to come back and see it out, and he would see fair play. Ward would not. Honeyman turned to Askins, said, "You are a damned rascal to strike a man before he is ready," knocked him down, stamped on him, and beat him. Two or three times, as Askins raised himself to his knee, Honeyman knocked him down, telling him, "Ben, if you know when you are well, lie still." Askins died the next day of the bruises. He was a puny, weak man; Honeyman was a stout young fellow.

Brackenridge and Carson, for the defendant. Fighting on a sudden quarrel, and killing, is only manslaughter. We admit this is manslaughter. Though implied malice be sufficient to make the killing murder, still there must be malice. If there be no circumstances of malignity, or if the killing be sudden, or with a weapon not likely to kill, there is no ground for implying malice. Here there is no deliberate design. The parties were in liquor. Askins and Honeyman were on terms of friendship. Askins violated the peace in his own house. Honeyman wanted to repress him, and what he did was in defense of his friend.

Galbraith, for the state, contended that from the evidence, and the law arising out of it, the killing was murder.

PRESIDENT. The unfortunate ground of this crime is that riotous intemperance, so dangerous on all occasions, especially in unguarded and unprincipled company.

This is not justifiable homicide, not having happened in the discharge of any duty; nor is it excusable, not having happened in self-defense, or by accident. It must, therefore, be felonious homicide; and the question is whether it is murder or manslaughter.

Prima facie, every killing is murder, for malice is presumed, unless the prisoner show extenuating circumstances, which take away

[12] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 71, 72.

the presumption of malice. If there be no malice, it is but manslaughter. If there be express malice, or malice implied in the circumstances of the transaction, it is murder. The distinction between murder and manslaughter is nice; and cases lying on the borders of both have been often, and long and earnestly, disputed, and doubtfully decided. Hence so many special verdicts, to find whether manslaughter or murder.

I have said that every voluntary killing, or every act which apparently must do harm, which is done with intent to do harm, and done without provocation, and of which death is the consequence, is murder; for provocation is not presumed, and malice is presumed. The law implies malice, and the defendant must show provocation, to rebut the presumption of malice. But malice may be more than implied; it may be express. Malice express is a deliberate or formed design of taking away the life of another, or of doing him some bodily mischief; and this may be manifested either by words or actions. Implied malice is collected either from the manner of the killing, or from the person killed, or the person killing. In willful poisoning, in killing, though undesignedly, by a voluntary act, apparently mischievous, or in killing without provocation, malice is implied from the manner of the act; and it is not necessary that the malice should have existed long before. It is sufficient, if it exist at the time. Malice, as used in the definition of murder, is a technical expression, and not to be taken in the common sense of that word. In common acceptation, malice is taken to be a settled anger in one person against another, and a desire of revenge. But in this legal or technical acceptance it imports a wickedness, which includes a circumstance attending an act, that cuts off all excuse. It is used as synonymous to frowardness of mind, and means that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit, the plain indications of a heart regardless of social duty, and fatally bent upon mischief. It is a design of doing mischief, a voluntary cruel act. Malice, therefore, is implied in every act of killing for which there is no legal justification, excuse, or extenuation.

The excuse for murder arises from authority not wantonly or cruelly exercised or abused, or from the infirmity of the human constitution. A father may correct his child, or a master his servant, apprentice, or scholar, in a reasonable manner; and if an accidental death ensue it is only manslaughter, or perhaps homicide per infortunium. But if the correction be unreasonable, with unusual or improper weapons, or with extraordinary circumstances of cruelty, and if death be the consequence of it, such killing is murder. Such would be the case of a killing, by any person, in the preservation of the peace. If one, having no authority over another, but provoked to passion by an act of personal violence, in his passion beat the person thus violently

provoking him, and by such beating kill him, it is but manslaughter. Passion excludes the presumption of malice. But if the provocation was not sufficient, or, whatever it might have been, if there was no passion excited, or, though excited, if there was time for the passion to cool, and it had subsided, the killing is murder. Cool expressions, wanton and deliberate or unusual cruelty, are evidences of want of passion, and are therefore evidences of malice. Suddenly interfering, in favor of a friend engaged in combat with another, and killing the other in defense of this friend, has been held but manslaughter. This must be on the supposition of passion excited by the danger of the person in whose favor the killer interferes in the quarrel.

The jury are the judges whether the facts be true or not. The court must judge of what description the crime is, which those facts compose, whether murder, manslaughter, or inferior homicide; for that is defining or explaining what the law is, and this is the duty of the court.

It becomes our duty, therefore, to say, on the supposition that the facts stated, and not contradicted here, were what really happened, whether they amount to manslaughter only, or to murder. This depends on whether Honeyman acted with malice aforethought in its legal sense; and this depends on whether he acted on sufficient provocation and in passion.

He had no provocation. The provocation was to Ward. There was no occasion to interfere in favor of Ward; for he had left the house, and was out of the reach of danger, if he had ever been in any, from Askins. Askins was preserving (however improperly) the peace of his own house. Honeyman had no right to interfere; and we see no interest that he had in Ward more than in Askins, nor any motive, but the love of mischief. If even there had been provocation (and there was none), Honeyman appears to have been cool, and without passion. As he knocks down Askins, he says, "If you know when you are well, Ben, lie still." His acts are voluntary, wanton, deliberate, and cruel, to a poor, weak man. They are the symptoms of a froward mind, of a wicked, depraved, and malignant spirit, the plain indications of a heart regardless of social duty and fatally bent upon mischief. They therefore manifest malice aforethought; and this killing is murder.

The jury found him guilty of murder; and sentence of death was passed on him. An application was made for a pardon, and, on a reference to the Attorney General, he suggested, as an error in the indictment, that the epithets feloniously, willfully, etc., applied to the assault, were not also applied to the stroke. On this a writ of error was brought. What the issue of this was, or whether Honeyman was pardoned, I know not.[18]

[18] The judgment was reversed on the ground suggested by the Attorney General. See 2 Dall. 228, 1 L. Ed. 359.

Prisoners found not guilty

REGINA v. SERNÉ et al.

(Central Criminal Court, 1887. 16 Cox, C. C. 311.)

The prisoners, Leon Serné and John Henry Goldfinch, were indicted for the murder of a boy, Sjaak Serné, the son of the prisoner Leon Serné; it being alleged that they willfully set on fire a house and shop, No. 274 Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné, with his wife, two daughters, and two sons, were living at the house in question, and that Serné at the time he was living there, in midsummer, 1887, was in a state of pecuniary embarrassment, and had put into the premises furniture and other goods of but very little value, which at the time of the fire were not of greater value than £30. It also appeared that previously to the fire the prisoner Serné had insured the life of the boy, Sjaak Serné, who was imbecile, and on the 1st day of September, 1887, had insured his stock at 274 Strand for £500, his furniture for £100, and his rent for another £100, and that on the 17th of the same month the premises were burnt down.

Evidence was given on behalf of the prosecution that fires were seen breaking out in several parts of the premises at the same time, soon after the prisoners had been seen in the shop together; two fires being in the lower part of the house and two above, on the floor whence escape could be made onto the roof of the adjoining house, and in which part were the prisoners and the wife and two daughters of Serné, who escaped; that on the premises were a quantity of tissue transparencies for advertising purposes, which were of a most inflammable character, and that on the site of one of the fires was found a great quantity of these transparencies close to other inflammable materials; that the prisoner Serné, his wife, and daughters were rescued from the roof of the adjoining house, the other prisoner being rescued from a window in the front of the house, but that the boys were burnt to death—the body of the one being found on the floor near the window from which the prisoner Serné, his wife, and daughters had escaped, and the body of the other being found at the basement of the premises.

STEPHEN, J. Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the willful murder of the boy, Sjaak Serné, a lad of about 14 years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of willful murder, inasmuch as you have heard something said about constructive murder. Now, that phrase, gentlemen, has no legal meaning whatever. There was willful murder ac-

cording to the plain meaning of the term, or there was no murder at all in the present case. The definition of murder is unlawful homicide with malice aforethought; and the words "malice aforethought" are technical. You must not, therefore, construe them, or suppose that they can be construed, by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is the killing of another person by an act done with an intent to commit a felony. Another meaning is the act done with the knowledge that the act will probably cause the death of some person. Now, it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony—that is to say, the setting of the house on fire in order to cheat the insurance company—or by conduct which, to their knowledge, was likely to cause death, and was therefore eminently dangerous in itself, in either of these cases the prisoners are guilty of willful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now, when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this; that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so.

The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, whilst that part of the law under which the crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the

throat to overpower her, and in so doing killed her, that would be murder. I think that every one would say, in a case like that, that when a person began doing wicked acts for his own base purposes he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that, if that were really done, it matters very little indeed whether the prisoners hoped the people would escape, or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying the law of England lays down a rule of broad, plain, common sense. Treat a murderer how you will, award him what punishment you choose, it is your duty, gentlemen, if you think him really guilty of murder, to say so. That is the law of the land, and I have no doubt in my mind with regard to it. There was a case tried in this court, which you will no doubt remember, and which will illustrate my meaning. It was the Clerkenwell Explosion Case in 1868, when a man named Barrett was charged with causing the death of several persons by an explosion which was intended to release one or two men from custody; and I am sure that no one can say truly that Barrett was not justly hanged. With regard to the facts in the present case, the very horror of the crime, if crime it was, the abomination of it, is a reason for your taking the most extreme care in the case, and for not imputing to the prisoners anything which is not clearly proved. God forbid that I should, by what I say, produce on your minds, even in the smallest degree, any feeling against the prisoners. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance

of your duty if, being satisfied with the evidence, you do not convict one or both the prisoners of willful murder, and it is willful murder of which they are accused. [The learned judge then proceeded to review the evidence. In the result the jury found a verdict of not guilty in respect of each of the prisoners.]

Verdict—Not guilty.

V. Voluntary Manslaughter [14]

STATE v. HILL.

(Supreme Court of North Carolina, 1839. 20 N. C. 629, 34 Am. Dec. 396.)

The prisoner was indicted for murder, at Wake, on the last circuit, before his honor, Judge Saunders. * * *

The jury returned a verdict of guilty, and, sentence of death being pronounced upon the prisoner, he appealed.

GASTON, Judge.[15] * * * The jury were instructed "that if the prisoner gave the first blow, and was then cut by the deceased, although he might have been agitated by excitement and anger, yet if they collected from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and did the act intentionally, it was murder." This proposition, as we understand it, and as we must believe it to have been understood by the jury, we are very confident cannot be sustained.

The proposition supposes that the first assault was made by the prisoner without malice, and that the fatal wound was given while under the influence of indignation and resentment, excited by the excessive violence with which he had been in turn assailed by the deceased; but it refuses to the prisoner the indulgence which the law accords to human infirmity suddenly provoked into passion, if such passion left to him so much of deliberation and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary. No doubt can be entertained, and it is manifest that none was entertained, by his honor, but that the excessive violence of the deceased, immediately following upon the first assault, constituted what the law deems a provocation sufficient to excite furious passion in men of ordinary tempers. The case does not state that the first blow given by the prisoner was such as to endanger life or

[14] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 75.

[15] The statement of facts is abridged and part of the opinion is omitted.

to threaten great bodily harm, nor that it was immediately followed up by further efforts or attempts to injure the deceased. It must be taken to have been a battery of no very grievous kind, and it justified the deceased in resorting to so much force on his part as was reasonably required for his defense; and in estimating the quantum of force which might be rightfully thus used the law will not be scrupulously exact. But, when an assault is returned with a violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant.

Such, according to the case, was the state of this affray, when the mortal wound was given. To avenge a blow, the deceased attacked the prisoner with a knife, made three cuts at him, and gave him a severe wound in the abdomen. If instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an infirm human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the furor brevis, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity.

The proper inquiry to have been submitted to the jury on this part of the case was whether a sufficient time had elapsed after the prisoner was stabbed, and before he gave the mortal wound, for passion to subside and reason reassume her dominion; for it is only during the temporary dethronement of reason by passion that this allowance is made for man's frailty. And in prosecuting this inquiry every part of the conduct of the prisoner, as well words as acts tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result. * * *

Judgment to be reversed.

Judgment for State, first.
Revised — Judgment for defdt

STATE v. GRUGIN.

(Supreme Court of Missouri, 1898. 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553.)

SHERWOOD, J.[16] * * * The salient topics which this record presents, and on which our attention will be centered, are these:

First. Did the outrage perpetrated by Hadley on his young sister-in-law Alma, defendant's daughter, authorize and require a submission to the jury of the question whether defendant's shooting Hadley was done in "hot blood," and therefore only manslaughter?

Second. Did the insolent and defiant reply of Hadley, when questioned by defendant as to the vile deed he had done to the latter's daughter, authorize and require a submission to the jury of the question whether the words used by Hadley were such as to generate a sufficient or reasonable provocation, so as to produce hot blood, and thus lower the grade of the homicide in either degree to manslaughter?

Third. Whether certain instructions given at the instance of the state should have been refused?

Fourth. Whether a certain instruction asked by defendant should have been given, either as asked or in a modified form?

1. In discussing the first question propounded, we are necessarily brought into contact with that line of cases which treat of "hot blood" and how it may be engendered. Among other familiar instances furnished by the books are those where a husband finds a man in the act of adultery with his wife and immediately kills him or her. That is accounted but manslaughter, and it is the lowest degree of that offense; and therefore in such a case the court directed the burning in the hand, to be gently inflicted, because there could not be a greater provocation. Sir T. Raym, 212.

According to the old books, such discovery of the wife's adultery must have been made in the very act, and the killing must have been done "directly on the spot" in order to reduce the homicide to manslaughter. 4 Black. Com. 191; 3 Greenl. Ev. (14th Ed.) § 122. The husband must have "ocular inspection of the act, and only then." Pearson's Case, 2 Lew. 216; 1 Hale, P. C. 487.

But since the law, as other sciences, makes progress, it is no longer accounted necessary that a husband should have "ocular inspection," etc. It suffices if the provocation be so recent and so strong that the husband could not be considered at the time master of his own understanding. State v. Holme, 54 Mo. 153. In the case just cited, the case of Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, was approved, the facts in that case having been these: "The prisoner offered evidence tending to show the commission of adultery by H. with

[16] Part of the opinion is omitted.

the prisoner's wife. Within half an hour before the assault the proof showed that the prisoner saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed after them to the woods; that they were seen not long after coming from the woods, and that the prisoner followed on in hot pursuit, and was informed on the way that they had committed adultery the day before; that he followed H. into a saloon in a state of excitement, and there committed the assault. The court held that the evidence was proper, as from it it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which would have given to the homicide, had death ensued, the character of manslaughter only. The evidence showed that the prisoner, in following H. from the woods, was laboring under great excitement, that when a friend told him on the way what had happened the day before his passion was increased, and that when he arrived at the saloon the perspiration had broken out all over his face." And in that case it was ruled that the question as to what is an adequate or reasonable provocation is one of fact for the jury, and so, also, is the question whether a reasonable time had elapsed for the passion to cool and reason to resume its control. * * *

The trial court, while it admitted the evidence which preceded the killing, yet by its instructions denied that such evidence had any effect to lower the grade of defendant's crime from either degree of murder to manslaughter. If the evidence referred to was to be denied any effect, then it should not have been admitted. The instructions for the state under review were also erroneous, in that they dictated to the jury as a matter of law what was a sufficient or reasonable provocation and what a sufficient cooling time. * * *

2. The second interrogatory is next for consideration. It embodies and comprehends the question whether words constitute a sufficient or reasonable provocation in law. Of course, the books abound in utterance of the platitude that words, however opprobrious, constitute no provocation in law. Speaking as the organ of this court, I have often uttered this platitude myself; but the statement is subject to many qualifications. The general good sense of mankind has in some instances so far qualified the rigor of what is termed the ancient rule that a statute has been passed in Texas which reduces a homicide to manslaughter where insulting words are used to or concerning a female relative. The killing is reduced to manslaughter where it occurs as soon as the parties meet after the knowledge of the insult. 9 Am. & Eng. Ency. of Law, 581.

In Alabama a statute provides that opprobrious words shall in some circumstances justify an assault and battery. Riddle v. State, 49 Ala. 389. And in that state, without any statutory provision on the subject, it has been determined that "insult by mere words," when the

defendant acts on them and he has not provoked them, may be weighed by the jury with other evidence in determining whether the killing was murder in the first or second degree. Watson v. State, 82 Ala. 10, 2 South. 455. * * *

I will now refer to some adjudications where insulting words have been held a sufficient basis for a charge or an instruction on the offense of manslaughter. Where the prisoner was indicted for the willful murder of his wife, Blackburn, J., in summing up, said: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hear from his wife that she had committed adultery, and he, having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again.' Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?" Reg. v. Rothwell, 12 Cox, C. C. 145. In that case (tried in 1871) the husband seized a pair of tongs, close at hand, and struck his wife three violent blows on the head, from which she died within a week, and the verdict was for manslaughter. * * *

[The Court here reviewed Reg. v. Smith, 4 Fost. & F. 1066; Seals v. State, 3 Baxt. (Tenn.) 466, and Wilson v. People, 4 Parker, Cr. R. (N. Y.) 619, and continued:]

So it will be seen that there are circumstances where words do amount to a provocation in law; i. e., a reasonable provocation to be submitted to the determination of the jury, and, if found by them to exist, then the crime is lowered to the grade of manslaughter. If there ever was a case to which this principle should be applied, it would seem it should be applied to the case at bar. A father is informed that his young daughter, just budding into womanhood, has been ravished by his son-in-law, while under the supposed protection of his roof. Arriving where the son-in-law is, and making inquiry of him why he had done the foul deed, that father receives the answer, "I'll do as I damn please about it." This insolent and defiant reply amounted to an affirmation of Hadley's guilt! So long as human nature remains as God made it, such audacious and atrocious avowals will be met as met by defendant. It should be held, therefore, that the words in question should have been left to the jury to say whether, in the circumstance detailed in evidence, they constituted a reasonable provocation, and, if so found,

that then defendant was guilty of no higher offense than manslaughter in the fourth degree. * * *

The judgment should be reversed, and the cause remanded. BURGESS, J., concurs in toto. GANTT, P. J., does not concur as to that portion of paragraph 2 in reference to words being regarded as a reasonable provocation by either court or jury.

VI. Involuntary Manslaughter [17]

REGINA v. MARRIOTT.

(Central Criminal Court, 1838. 8 Car. & P. 425.)

Murder.[18] The first count of the indictment stated that it was the duty of the defendant to provide one Mary Warner, under the care and control of the defendant, with sufficient meat, drink, clothing, firing, and medicine, and that by the neglect of the defendant so to provide said Mary Warner with sufficient meat, etc., said Mary Warner became mortally diseased, and of said mortal disease died. There was a second count charging that the defendant willfully, etc., assaulted Mary Warner, and confined her in a certain dark, cold, unhealthy, and unwholesome room, without proper food, etc., by means of which she died.

From the evidence of the prosecution it appeared that the deceased, Mrs. Warner, who was about 74 years of age, had lived for some time with a sister in Cannon street, in the city, in a house which they let out in lodgings, and of which the sister had a lease under the Pewterers' Company. Upon the death of the sister whose name was Reepe, in March, 1837, the prisoner attended at the funeral, and, among others, a grandson of Mrs. Reepe, named Charles Reepe, was present. He was called as a witness, and gave his evidence as follows: "Mrs. Warner's sister was my grandfather's second wife. I remember the death of Mrs. Reepe. I went to her funeral, and saw the prisoner there. After the funeral he called me on one side, and asked if I should have any objection to pay for my cloak, and my sister's, and my brother's also, as he did not wish to put Mary Warner to any expense, and he should pay for his. He told me he was left executor. He showed me about a quarter of a sheet of writing paper as a will, and told me he had found it by mere chance lying on the

[17] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 76.

[18] The statement of facts is abridged.

ground. I observed Mrs. Warner was much grieved, and took a chair and sat down by the side of her, and told her she should come and live at home with me, and I would make her happy and comfortable for the remainder of her life. Her reply was, that it was a kind offer, certainly. The prisoner said: 'No, no, sir; she shall go home and live along with me, as you are no relation whatever.' I asked him what relation he was. He said he was a townsman, and that he had buried Mrs. Reepe's sister, and it was Mrs. Reepe's wish that he should bury her too; in fact, that he was executor. He said: 'Mrs. Warner is going home to live along with me until affairs are settled, and I will make her happy and comfortable.'"

To prove the interference of the prisoner in Mrs. Warner's affairs, as well as to show that he had undertaken to provide her with food and other necessaries, a Mrs. Cruikshank was called as a witness. She said: "I am the wife of Robert Cruikshank, and live at No. 34 Cannon street, city. Some days previous to the 10th of October I went with my husband to No. 1 Dolphin Court. I there saw the prisoner and his wife. Mr. Marriott asked me to write an agreement about the house No. 34 Cannon street, of which Mr. Cruikskank was to take the upper part. I heard the prisoner mention the name of Mary Warner to his wife. He talked in an indistinct tone. I could hear nothing more than the name of Mary Warner. Mrs. Marriott dissented to what he said, whatever it was, and he again repeated it to her, and she again dissented. I asked the prisoner what interest Mrs. Warner had in the house, and he said, 'None whatever.' He asked me 'if I remembered a conversation he had with me respecting the decease of Mrs. Reepe.' I told him, 'Perfectly well.' He said, 'Did I not remember he had told me at Mrs. Reepe's decease that Mrs. Warner was her sister.' I inquired in what way Mrs. Warner could be a party to the agreement. His reply was, 'None whatever.' He said something about her not being capable of undergoing the fatigue; that at her advanced age she was quite incapable; that he had been accustomed to let lodgings. There was an agreement ultimately signed. I produce it. It is not stamped. After it had been signed, I inquired whether Mrs. Warner was a relative, as he seemed to take such an interest in her affairs. He said, 'None at all.' He said, respecting the house in Cannon street, Mrs. Warner having been accustomed to let lodgings, he had taken the lease of the house of the Pewterers' Company, on condition of paying up an arrear of rent; that they had given him four years to pay it by three installments, £20 of which he had paid, in consideration of which he had undertaken to keep Mrs. Warner comfortable as long as she lived. I wished to purchase some of the furniture, and he said I might make my own selection. He did not say to whom it belonged. I understood it was his own property. He did not speak of it as anybody's property but his own. He appointed a Mr. Kelly to value the furniture in

the house in Cannon street to Mr. Cruikshank, and a Mr. Phillips was appointed to value it for us. The amount of the valuation was £37, within a few shillings. That has not been paid. We were to pay it to Mr. Marriott." On her cross-examination she said: "When the name of Mary Warner was mentioned, and Mrs. Marriott shook her head, the prisoner said, 'Yes, yes, better;' and the name of Mary Warner was put into the agreement, because Mrs. Marriott asked me to do so."

The clerk to the Pewterers' Company was called and he said: "There was never any premises in Cannon street let to the prisoner. He never at any time took a lease in any shape from the Pewterers' Company. He has paid two installments of £11 15s. each for arrears of rent due from Mrs. Reepe. He paid it as her executor. He so stated." On his cross-examination he was asked whether there was not a petition sent in on the part of Mary Warner, as the sister of Mrs. Reepe, to let her off the arrears in consideration of her long tenancy. His reply was: "There was a memorial sent in in the name of the prisoner. He stated his object to be to serve Mary Warner. The prayer of the petition was not acceded to. He made himself answerable for the amount, and signed a written memorandum." The will of Mrs. Reepe was read. It was dated the 26th of March, 1836, bequeathing to Mrs. Warner all her effects, and the lease of the house in Cannon street. A clerk in the Prerogative Office was called, and stated that the personal property was sworn under £100, and that letters of administration were granted the 20th of July, 1837; that Mrs. Warner must have appeared personally; and that the prisoner was one of her sureties for the proper administration of the effects.

PATTESON, J., in summing up (after stating the first count of the indictment and observing upon certain parts of the evidence), said: If the prisoner was guilty of willful neglect, so gross and willful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing. [His Lordship then read the statements of Mr. Reepe, and Mrs. Cruikshank, and continued:] This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, yet, if by his negligence her death was occasioned, then he becomes criminally responsible.

Verdict—Guilty of manslaughter only.

OFFENSES AGAINST THE PERSON (Continued)

I. Rape[1]

DON MORAN v. PEOPLE.

(Supreme Court of Michigan, 1872. 25 Mich. 356, 12 Am. Rep. 283.)

CHRISTIANCY, C. J.[2] * * * The court charged the jury as follows:

"If you find that the defendant represented to the complaining witness that, as a part of his medical treatment, it was necessary for her to have carnal connection with him, that such representations were false and fraudulent, that she believed it, and, relying upon it, consented to the solicitations of the defendant, and had connection with him, and that such representations were made for the purpose of inducing her to give such consent, and that without it she would not have yielded, the defendant is guilty of the crime charged against him." * * *

It will be noticed that this charge leaves out and wholly ignores all idea of force as a necessary element of the crime charged; and the jury were, in effect, told that the defendant might be found guilty of the rape, though he neither used, nor threatened to use, any force whatever in case of her refusal, and though she might have assented without any constraint produced by the fear or apprehension of force, or any dangerous or serious consequences to herself if she refused or resisted.

This feature of the charge is assigned as error, and presents the only question raised in the case by the plaintiff in error.

The definition of rape, as generally given in the English books, is that "rape is the unlawful carnal knowledge, by a man of a woman, forcibly (or by force), and against her will." 3 Coke's Inst. (Thomas' Ed.) 549; 1 Hale, P. C. 628; Hawkins, P. C. (Cur. Ed.) 122; 4 Bl. Com. 210; 1 Russ. on Cr. (Greenl. Ed.) 675. This definition depended, perhaps, partly upon the common law, but mainly upon two early and rather loosely worded English statutes, one of which (St. Westm. II, c. 34) expressly made force an element in the crime, if the party were attainted at the king's suit (though not when the proceeding was by appeal), and the other (St. Westm. I, c. 13) which did not require

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 79, 80.

[2] Part of this case is omitted.

force as an element, except as it might be inferred from the word, "ravished." See 2 Bish. Cr. L. §§ 1067 to 1069, where the substance of these statutes is given. And, as remarked by Mr. Bishop (2 Bish. Cr. L. § 1073), the more correct definition to be gathered from these statutes would have been: "Rape is the unlawful carnal knowledge by a man of a woman, by force, when she does not consent." The difference between the two definitions, however, would seem to be important only in cases where the female with whom the connection is had may be said to have no will, as in the case of an idiot, or insane person, or one in a state of unconsciousness, in which cases, if anywhere, the force necessary to accomplish the act itself without resistance could possibly be held to constitute the force contemplated by the definition of the offense. See Rex v. Ryan, 2 Cox, C. C. 115; Reg. v. Fletcher, Bell, C. C. 63; Reg. v. Camplin, 1 Den. C. C. 89. But this particular class of cases has no special bearing upon the case now before us (and we do not discuss it); nor are we embarrassed by any uncertainty in the definition of the offense.

Our statute has adopted substantially the definition first above given from the English authorities. Section 5730, Comp. Laws 1857, declares: "If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, * * * he shall be punished," etc.

In the interpretation of this statute, it is clear that the term "by force" must not be wholly rejected or ignored, but that some effect must be given to it, and the language of the provision certainly requires something more to be shown than if these words had been omitted; and it is equally clear that if that particular kind and amount of force only is required which is always essential to the act of sexual connection itself, when performed with the assent of the woman, then no effect whatever is given to the term "by force," but the interpretation and the effect of the statute will be precisely the same as if these words were not contained in it. This interpretation, therefore, is not permissible. Some effect must be given to the words; and such has been the almost, if not entirely, uniform course of decision, both in England and in this country, where the definition of the offense is substantially the same as that given by our statute, when the charge has been for the actual commission of the rape upon a female of the age of proper discretion, of sound mind, and in full possession of her faculties, however fraudulent the means, or false the pretenses, by which her consent was procured. I have not been able to find a single well-authenticated case, where the question was directly raised, in which it has been directly decided the other way. * * * The true rule as to force in cases of rape generally was recognized by this court in People v. Valentine Cornwell (not Crosswell v. People, as printed in the Report) 13 Mich. 433, 87 Am. Dec. 774, where it was said that "the essence of the crime is not the fact of intercourse, but the injury and outrage to

the feelings of the woman by means of the carnal knowledge effected by force." And there being no force used or threatened in that case, but strong grounds for believing that the woman was the soliciting party, the connection was properly held not to constitute rape, though the woman was not of sound mind, and had no intelligent understanding at the time the act was committed, but was in good physical health. In cases where the woman is entirely insensible from idiocy, or from the effect of drugs administered (though the point is not here involved), it may be entirely right to hold a very slight degree of force sufficient; and that amount of force which, in such cases, would always be necessary, beyond what would be required with a consenting party, might, perhaps, properly be held, as it sometimes has been held, sufficient to make the transaction a rape, as suggested by my Brother Cooley in People v. Cornwell, ubi supra.

And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs and that directly exerted by his hand and for the same purpose.

The only question really involved in People v. Cornwell, above cited, was whether, under the circumstances of that case, the defendant could be held guilty without proof of force in any form, actual, or threatened, and it was, I think, properly held by us that he could not.

If the statute, or the definition of rape, did not contain the words "by force," or "forcibly," doubtless a consent procured by such fraud as that referred to might be treated as no consent; but the idea of force cannot be thus left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply and satisfy all the other terms of the definition, and, so far as the intimation in question is to be understood as going further and dispensing with all idea of force, it must be understood as an intimation of the court of what, in their opinion, the law ought to be, rather than what it is. And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence; and it might, and in my opinion would, be judicious for the Legislature to make some provision for punishment in cases of this kind. But it is not for the judiciary to legislate, by straining the existing criminal law to bring such cases within it.

For the reasons given, I think the judgment of the recorder's court should be reversed, and a new trial awarded.

And, with reference to a new trial, it is proper for the guidance of the recorder's court to consider the nature of the evidence set forth

in the record, and which will probably appear upon the new trial, and to determine what charge the state of facts would warrant, or whether there was anything in the evidence which would authorize the jury to find that the carnal connection was obtained "by force and against the will" of the party injured.

We think it is well and properly settled that the term "by force" does not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection, but that force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim, so that she dare not resist, is, and upon all sound principles must be, regarded, for this purpose, as in all respects equivalent to force actually exerted for the same purpose. See Reg. v. Hallett, 9 C. & P. 748; Reg. v. Day, Id. 722; Wright v. State, 4 Humph. (Tenn.) 194; Pleasant v. State, 8 Eng. 360. And see Strang v. People, 24 Mich. 1. Nor, as appears by the case last cited, need the threats be of force to be used in accomplishing the act, as in that case the principal threat was that, if she refused, he would take her away where she could never get back. In fact, we think the terms of the statute in reference to force are satisfied by any sexual intercourse to which the woman may have been induced to yield only through the constraint produced by the fear of great bodily harm, or danger to life or limb, which the prisoner has, for the purpose of overcoming her will, caused her to apprehend as the consequence of her refusal, and without which she would not have yielded.

It remains only to apply these principles to the present case.

Considering the way and the purpose for which the girl had been placed by her father under the care and treatment of the defendant as her physician, the evidence had a tendency to show, and the jury might properly have found, that the girl was induced by the defendant to submit to the sexual intercourse with him from the fear and under the apprehension, falsely and fraudulently inspired by the defendant for the purpose of overcoming her opposition, that, if she did not yield to such intercourse, he intended to, and would, use instruments "for the purpose of enlarging the parts," and that such operation with instruments would be likely to kill her. And if the jury should so find—with or without the other facts submitted to them by the charge given—and that she would not otherwise have yielded, it would be their duty to find the defendant guilty of the crime charged.

The judgment must be reversed, and a new trial awarded.

CAMPBELL, J., concurred.

COOLEY, J. As my Brethren are agreed in this case, I concur in the result, while not fully assenting to all that is expressed in the opinion.

GRAVES, J., did not sit in this case.

THE QUEEN v. FLATTERY.

(Court for Crown Cases Reserved, 1877. 2 Q. B. Div. 410.)

KELLY, C. B.[3] I think this conviction ought to be affirmed. Mr. Lockwood has ably argued that there was consent on the part of the prosecutrix, and therefore no rape. But, on the case as stated, it is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretenses of the prisoner, and that the only thing she consented to was the performance of a surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised. Sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other words, she submitted to a surgical operation, and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition; and, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is, therefore, not within the authority of those cases which have decided—decisions which I regret—that, where a man by fraud induces a woman to submit to sexual connection, it is not rape. * * *

Conviction affirmed.

II. Assault and Battery[4]

STATE v. DANIEL.

(Supreme Court of North Carolina, 1904. 136 N. C. 571, 48 S. E. 544, 103 Am. St. Rep. 970.)

WALKER, J.[5] * * * The first instruction was that if the defendant cursed the prosecutor, Alston, and ordered him to come to him, and Alston obeyed through fear, the defendant was guilty of

[3] The statement of facts and the opinions of Mellor, Denman, and Field, JJ., and Huddleston, B., are omitted.

[4] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 81–83.

[5] The statement of facts and part of the opinion are omitted.

an assault. Before the prosecutor reached the place near the hog pen where the defendant was standing, the latter had made no threat, nor had he offered or attempted any violence to the person of the prosecutor, nor was there any display or exhibition of force of any kind, so far as the evidence here shows. In this state of the case we are unable to sustain this instruction as a correct statement of the law of assault. "It would seem," says Reade, J., "that there ought to be no difficulty in determining whether any given state of facts amounts to an assault; but the behavior of men towards each other varies by such mere shades that it is sometimes very difficult to characterize properly their acts and words." State v. Hampton, 63 N. C. 14. While the law relating to this crime would seem to be simple and of easy application, we are often perplexed in our attempt to discriminate between what is and what is not an assault. But in this case we have no such difficulty, as the law applicable to the facts has been clearly stated and well settled by the decisions of this court.

An assault is an intentional offer or attempt by violence to do any injury to the person of another. There must be an offer or attempt. Mere words, however insulting or abusive, will not constitute an assault; nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. Where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and there has been a sufficient offer or attempt. State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; State v. Reavis, 113 N. C. 677, 18 S. E. 388. This principle, as stated by Judge Gaston in the first case cited, has been adopted as a correct exposition of the law of assault, not only in subsequent decisions of this court, but in numerous cases decided in the courts of the other states. There must, therefore, be not only threatening words or violence menaced, but the defendant must have committed some act in execution of his purpose. It is not necessary at all that his words should be accompanied or followed by an actual battery, for a mere assault excludes the idea of a battery; but he must either offer to do violence, as by drawing back his fist or raising a stick, or attempt to do it, as by aiming a blow at another, which does not take effect because it is warded off by a third person, or by shooting at another and missing the mark, all of which is clearly and fully explained by Pearson, C. J., in State v. Myerfield, 61 N. C. 108. It is not necessary, in view of the facts of this case, that we should stop here to state how these acts can be qualified by words or otherwise, and with what restrictions or exceptions, so as to relieve the accused of any guilt. The law in this respect is also discussed in Myerfield's Case, supra.

The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put an-

other in fear and thereby force him to leave a place where he has the right to be. State v. Hampton, 63 N. C. 13; State v. Church, 63 N. C. 15; State v. Rawles, 65 N. C. 334; State v. Shipman, 81 N. C. 513; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Jeffreys, 117 N. C. 743, 23 S. E. 175. It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury; for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. State v. Jeffries and State v. Martin, supra. It is sufficient if the aggressor, by his conduct, lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Pr., Pl. & Ev. (8th Ed. by Pomeroy) 907, 908.

If, therefore, the defendant had threatened the prosecutor with violence and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at the time in striking distance. But in this case, so far as the facts recited in the first instruction should be considered, there was not even violence menaced, but, at most, only offensive and profane words. There must be an overt act, or an attempt, or the unequivocal appearance of an attempt, with force and violence to do a corporal injury—such an act as will convey to the mind of the other person a well-grounded apprehension of personal injury. Bare words will never do; for, however violent they may be, they cannot take the place of that force which is necessary to complete the offense. They are often the exhibition of harmless passion, and do not by themselves constitute a breach of the peace, as the law supposes that against mere rudeness of language ordinary firmness will be a sufficient protection. State v. Covington, 70 N. C. 71.

It may be, as suggested, that the positions of the two parties were relatively unequal, as the defendant belonged to a strong and dominant and the prosecutor to a weak and servile race, and it may further be that the words of the prosecutor as he approached the defendant were the cringing utterances of servility and showed great humility and submissiveness, because of the lowliness of his station in life as compared with that of the defendant, and therefore he abjectly obeyed the latter's command to come to him. All this may be true; and while it

reflects little credit upon the defendant, whose conduct as it now appears to us cannot be too severely condemned, it cannot have the effect of reversing a long-established principle of the law to which we must adhere; it being founded upon reason and justice and treated by the courts and the text-writers as one of universal application. The case of State v. Milsaps, 82 N. C. 549, illustrates the extent to which the principle has been carried. In that case it appeared that the defendant addressed grossly insulting language to the prosecutor, and then picked up a stone about 12 feet from the prosecutor, but did not offer to throw it; and the court held that it was not an assault, but only violence menaced, and it was therefore error for the lower court to charge the jury that if the acts and words of the defendant were such as to put a man of ordinary firmness in fear of immediate danger, and the defendant had the ability at the time to inflict an injury, he would be guilty. Substantially to the same effect is State v. Mooney, 61 N. C. 434. See, also, Johnson v. State, 43 Tex. 576. In neither of those cases, though, was the prosecutor deterred from doing what he had a right to do, or in any respect unlawfully restrained in his action or conduct or constrained to act contrary to his wishes. * * * New trial.

Judgment for defdt. New trial ordered

CHAPMAN v. STATE.

(Supreme Court of Alabama, 1884. 78 Ala. 463, 56 Am. Rep. 42.)

SOMERVILLE, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault.

It may be that, if the indictment had been for robbery, the facts in evidence would have sustained the allegation of an assault, which, in cases of that nature, is often merely constructive; for every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive.

The present conviction, however, can be sustained only on the theory that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous, had the weapon been loaded and discharged. On this question the adjudged cases, both in this country and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care on more occasions than the present; and we are of the opinion that the better view is that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not without more, such an assault as can be punished criminally, although it may sustain a civil suit for

damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm," and can often be sustained by proof of a negligent act resulting in unintentional injury. Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Cooley on Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence. State v. Davis, 23 N. C. 125, 35 Am. Dec. 735. The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect; 2 Greenl. Ev. § 82; Roscoe's Cr. Ev. (7th Ed.) 296; People v. Lilley, 43 Mich. 521, 5 N. W. 982. Most of our decisions recognize the old view of the text-books that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another; 1 Russ. Cr. (9th Ed.) 1019; State v. Blackwell, 9 Ala. 79; Tarver v. State, 43 Ala. 354. In Lawson v. State, 30 Ala. 14, it was said that, "to constitute an assault, there must be the commencement of an act which, if not prevented, would produce a battery." The case of Balkum v. State, 40 Ala. 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions.

It is true that some of the modern text-writers define an assault as an apparent attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Cr. Ev. § 603; 2 Bish. Cr. Law, § 32. The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can at common law constitute an assault. It is unquestionably true that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray and presenting a walking cane as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or creating alarm in the mind; for one may

obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm. People v. Lilley, 43 Mich. 525, 5 N. W. 982, 1 Crim. Law. Mag. 605. And one may be put in fear under pretense of begging, as in Taplin's Case, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C. 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Greenl. Cr. Law Rep. pp. 271–275, and note, where all the cases are fully reviewed; 2 Addison on Torts (Wood's Ed. 1881) pp. 4–7, § 788, note 1; Roscoe's Crim. Ev. (7th Ed.) 296; 1 Russell Cr. (9th Ed.) 1020; Blake v. Barnard, 9 C. & P. 626; Reg. v. James, 1 C. & P. 530; Robinson v. State, 31 Tex. 170; McKay v. State, 44 Tex. 43; State v. Davis, 23 N. C. 125, 35 Am. Dec. 735.

The opposite view is sustained by the following authors and adjudged cases: 7 Bish. Cr. Law (7th Ed.) § 32; 1 Whart. Cr. Law (9th Ed.) §§ 603, 182; Reg. v. St. George, 9 C. & P. 483; Commonwealth v. White, 110 Mass. 407; State v. Shepard, 10 Iowa, 126; State v. Smith, 2 Humph. (Tenn.) 457. See, also, 3 Greenl. Ev. (14th Ed.) § 59, note "b"; 1 Arch. Cr. Pr. & Pl. (Pomeroy's Ed.) 907, 282–283; State v. Benedict, 11 Vt. 238, 34 Am. Dec. 688; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496.

The rulings of the court were opposed to these views; and the judgment must therefore be reversed, and the cause remanded.

STATE v. DAVIS.

(Court of Appeals of South Carolina, 1832. 1 Hill, 46.)

Indictment for assault and battery, at Edgefield. Fall term, 1832. Verdict—Guilty.

JOHNSON, J.,* delivered the opinion of the court.

The case made by the judge's notes, taken on the trial, and the concessions at the bar, appears to be this: Mr. Griffin, a gentleman of the bar, placed in the hands of James Robertson, the prosecutor, one of the deputy sheriffs of Edgefield district, a paper purporting to be a mortgage on a negro, then in the possession of Davis. Robertson found the negro at Hamburg, and took him into his possession; and having occasion to stop for the night on his way to Edgefield, when he went to bed he chained the negro to his bedpost, and in addition to this tied the negro with a rope, one end of which was tied to his own body. The defendants came to the house at night, and

* Part of the opinion is omitted.

avowed their determination to retake the negro at all hazards, and, despite of Robertson's remonstrances, broke the chain, cut the rope, and carried the negro off, without having done any other violence to the person of the prosecutor; and the leading question is whether this, in law, was an assault.

The general rule is that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has therefore been held that beating a house in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the personal inviolability. Respublica v. De Longchamps, 1 Dall. (Pa.) 114, 1 L. Ed. 59; Wambough v. Schank, 2 N. J. Law, 229, cited 2 part. Esp. Dig. 173. What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and, legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent in the extreme. They broke the chain with which the negro was confined to the bedpost, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person as the hat or coat which he wore, or the stick which he held in his hand. The conviction was, therefore, right. * * *

Motion dismissed.

FLOYD v. STATE.

(Supreme Court of Georgia, 1867. 36 Ga. 91, 91 Am. Dec. 760.)

Indictment for stabbing. Motion for new trial. Decided by Judge Holt, Burke superior court, November term, 1860.

Floyd stood conversing with the two Messrs. Brinson. He had open in his hand such a knife as farmers carry, and was perhaps whittling or cleaning his finger nails.

Whilden approached and asked Floyd if he had been accusing him of collecting money for his (Floyd's) slave and stealing it. Floyd said he did. Immediately Whilden struck Floyd with his fist, and Floyd stabbed him, and, pursuing Whilden, who walked backward, continued stabbing him.

Whilden drew his knife. Floyd ran. Whilden caught him and stabbed him. An interval occurred, while each was examining his

wounds. Whilden got an ax helve, ran after Floyd (who retreated), and beat him.[7] * * *

HARRIS, J. The general rule in criminal law in reference to assaults made on a person, and how they may be repelled defensively, is that contained in the charge of Judge Holt to the jury which tried this indictment: "That whether the stabbing by plaintiff in error amounted to self-defense depended on the nature and violence of the assault made on him." In this case the plaintiff in error received a blow with the fist of the assailant. As it does not appear by the record that there was great superiority in physical strength on the part of the assailant over that possessed by Floyd, nor it appearing that Floyd was in ill health at the time, nor other circumstance existing at the time which produced relatively great inequality between them for sudden combat, we are not able to find any fact in the case which could justify him in repelling the blow of the fist by the use of his knife. As a general rule it may safely be asserted that the law will not excuse or justify a man who repels a blow given him with the fist by stabbing the assailant.

Judgment affirmed.

BOYD v. STATE.

(Supreme Court of Alabama, 1889. 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31.)

SOMERVILLE, J.[8] The defendant, a schoolmaster, being indicted, was convicted of an assault and battery on one Lee Crowder, a pupil in his school, who is shown to have been about 18 years of age. The defense is that the alleged battery was a reasonable chastisement inflicted by the master in just maintenance of discipline, and in punishment of conduct on the part of the pupil which tended to the subversion of good order in the school.

The case involves a consideration of the proper rule of law prescribing the extent of the schoolmaster's authority to administer corporal correction to a pupil.

The principle is commonly stated to be that the schoolmaster, like the parent, and others in foro domestico, has the authority to moderately chastise pupils under his care, or, as stated by Chancellor Kent, "the right of inflicting moderate correction, under the exercise of a sound discretion." 2 Kent's Com. *203, *206. In other words, he may administer reasonable correction, which must not "exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose." If he go beyond this ex-

[7] The statement of facts is abridged.

[8] The statement of facts and part of the opinion are omitted.

tent, he becomes criminally liable, and, if death ensues from the brutal injuries inflicted, he may be liable, not only for assault and battery, but to the penalties of manslaughter, or even murder, according to the circumstances of the case. 1 Archbold's Cr. Prac. *218; 1 Bish. Cr. Law (7th Ed.) §§ 881, 882.

This power of correction, vested by law in parents, is founded on their duty to maintain and educate their offspring. In support of that authority, they must have "a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." 2 Kent's Com. *203. And this power, allowed by law to the parent over the person of the child, "may be delegated to a tutor or instructor, the better to accomplish the purpose of education." Id. *205; 1 Black. Com. *507.

The better doctrine of the adjudged cases, therefore, is that the teacher is, within reasonable bounds, the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction with a proper instrument in cases of misconduct, which ought to have some reference to the character of the offense and the sex, age, size, and physical strength of the pupil. When the teacher keeps within the circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit, he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits; and hence the parent or teacher is often said, pro hac vice, to exercise "judicial functions."

All of the authorities agree that he will not be permitted to deal brutally with his victim, so as to endanger life, limb, or health. He will not be permitted to inflict "cruel and merciless punishment." Schouler's Dom. Rel. (4th Ed.) § 244. He cannot lawfully disfigure him, or perpetrate on his person any other permanent injury. As said by Gaston, J., in State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416, a case generally approved by the weight of American authority: "It may be laid down as a general rule that teachers exceed the limit of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain."

There are some well-considered authorities which hold teachers and parents alike liable criminally if, in the infliction of chastisement, they act clearly without the exercise of reasonable judgment and discretion. The test which seems to be fixed by these cases is the general judgment of reasonable men. Patterson v. Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818. The more correct view, however, and the one better sustained by authority, seems to be that when, in the judgment of reasonable men, the punishment inflicted is immoderate or excessive, and a jury would be authorized from the facts of the case to infer that it was induced by legal malice or wickedness of

motive, the limit of lawful authority may be adjudged to be passed. In determining this question, the nature of the instrument of correction used may have a strong bearing on the inquiry as to motive or intention. The latter view is indorsed by Mr. Freeman, in his note to the case of State v. Pendergrass, 31 Am. Dec. 419, as the more correct. "The qualification," he observes, "that the schoolmaster shall not act from malice, will protect his pupils from outbursts of brutality, whilst, on the other hand, he is protected from liability for mere errors of judgment." Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156, and note pp. 164–167; State v. Alford, 68 N. C. 322; State v. Harris, 63 N. C. 1. * * *

There was evidence in this case from which the inference of malice could have been deduced as influencing the conduct of the defendant in his chastisement of young Crowder, both as to his outbursts of temper and in the use of improper instruments of correction. Taking, as we must, every reasonable inference which the judge, acting as a jury, could have drawn from the evidence, we take as true, among others, the following facts: That after the severe chastisement administered in the schoolroom the defendant followed Crowder into the schoolyard, and struck him with "a limb or stick," and then "put his hands in his pocket, as if to draw a knife"; that, although Crowder did not strike back, but only protested against and resisted castigation, and, after apologizing for the objectionable language imputed to him, asked permission to withdraw from the school, the defendant, after promising not to strike him, "afterwards struck him in the face three licks with his fist, and hit him several licks over the head with the butt end of the switch." From these blows the eye of the young man was "considerably swollen," and was "closed for several days." The attending physician testified that there were "marks on his head made by a stick, in his opinion." One witness asserts that the defendant declared he "would conquer him (Crowder) or kill him." All the witnesses for the state say that the defendant was apparently very angry all the time, and was very much excited, and after he got through whipping Crowder he remarked, in an excited, angry voice, in the presence of the school and others, that he "could whip any man in China Grove beat." From this unseemly conduct on the part of one whose duty it was to set a good example of self-restraint and gentlemanly deportment to his pupils, there was ample room for the inference of legal malice, in connection with unreasonable and immoderate correction. Nor was the limb of a tree, of the size indicated by the evidence, nor a clinched fist applied in bruising the pupil's eye, after the manner of a prize fighter, a proper instrument of correction to be used on such an occasion.

The conviction must accordingly be sustained, without assuming any jurisdiction to review the correctness of the judge's finding on the facts.

Affirmed.

STATE v. BECK.

(Supreme Court of South Carolina, 1833. 1 Hill, 363, 26 Am. Dec. 190.)

Tried before Mr. Justice Richardson, at Pickens, fall term, 1833.

Indictment for an assault and battery. The defendants were all acquitted, except William Beck. The facts were these: One of the defendants had lost leather, and, suspecting it was stolen, got Beck and the other defendants to aid him in the search. They found the leather on the premises of Noble Anderson, and immediately took him into custody—whether under warrant or not, did not appear. Whilst in this state, some one, not Beck, asked Anderson if he would not rather be whipped than go to jail. He replied he would, and then requested Beck to whip him. Beck at first hesitated, but finally at the earnest entreaty of Anderson, and saying, "If it will oblige you, I will do it," consented; and, Anderson putting his arms around a tree, he gave him a few stripes with a switch. Anderson was then released, but was afterwards prosecuted, convicted, and punished for stealing the leather. Under these circumstances the presiding judge charged the jury that Beck was clearly guilty, and they found accordingly. He now moves for a new trial, on the ground that the whipping, having been inflicted at the importunity of Anderson and against the inclination of the defendant, was not an assault and battery.

HARPER, J. We do not think the act in question amounts to an assault and battery on the part of defendant Beck. A battery is generally defined to be any injury done to the person of another in a rude, insolent, or revengeful way. There is also another class of cases where some degree of negligence may be imputed; as when a person throwing stones into the highway strikes another passing, or as in the instance of a person throwing a lighted squib into a crowd. But when there is no intention to injure and no negligence, I do not think the offense can be imputed. An instance commonly put is that of a soldier firing his piece at muster, and without any fault of his own injuring another casually and suddenly passing before it. A surgeon, who for his patient's health, cuts off a limb, is not guilty of mayhem; or, if one plucks a drowning man out of a river by the hair of his head, this is no assault. If, according to the prescription of the physician in the Arabian Nights, a physician should beat his patient with a mallet for the bona fide purpose of restoring his health, though this might be malpractice, it would be no battery. Where one gave another a license to beat him, there is a case in which it is said the license was held void. This may well be. The person receiving the license entertained hostile dispositions toward the other, and, upon being thus licensed, proceeded to carry his revengeful purpose into effect. But in the case before us the defendant had no evil disposition toward Anderson but the contrary; and at his own earnest request, and to save him from

what he considered a greater evil, reluctantly consented to inflict the stripes. However ill-judged the act may have been, I cannot think it constituted an assault and battery. The case might be different with respect to the other defendants, who were acquitted; but as to the defendant before us the motion for a new trial must be granted.

JOHNSON and O'NEALL, JJ., concurred.

SMITH v. STATE.

(Supreme Court of Tennessee, 1846. 7 Humph. 43.)

GREEN, J.,* delivered the opinion of the court.

The plaintiff in error was indicted for an assault and false imprisonment of Mark M. Rodgers. The court charged the jury "that, to make out the offense as charged, no actual force was necessary, but that a man might be assaulted by being beset by another; and if the opposition to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

This charge is correct in all its parts, and the facts were fairly left to the jury. A verdict of guilty has been pronounced, and we do not feel authorized to disturb it. The prosecutor and defendant disputed about the ferriage defendant claimed. Smith insisted upon his demand, and said he did not choose to sue every man that crossed at his ferry. Although he did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor.

And this appears the more probable, as after the affair was settled the prosecutor inquired what defendant would have done if he had not paid the ferriage demanded, to which the defendant replied that "he would have put his carryall and horse back into the boat and taken them across the river again." As this determination existed in his mind, it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.

Affirm the judgment.

COMMONWEALTH v. NICKERSON.

(Supreme Judicial Court of Massachusetts, 1862. 5 Allen, 519.)

Indictment under Gen. St. 1860, c. 160, § 30. The first count charged that the defendants, three in number, on the fourth of August, 1860, at Nahant, committed an assault and battery upon Charles A. T. Rice, and then and there without any lawful authority, and without the con-

* The statement of facts is omitted.

sent and against the will of said Charles, confined and imprisoned him for the space of two hours. * * *

DEWEY, J.[10] The conviction of the defendants upon the first count of this indictment may be well sustained. The evidence shows an assault upon the person of C. A. T. Rice, and a restraint upon his liberty. Every such restraint of the liberty of a person, if not justified by law, is in the eye of the law a false imprisonment, for which the party was liable to an indictment at common law. Com. Dig. Imprisonment, G.; 3 Chit. Crim. Law, 835. The like offence is now made punishable by statute, under the provisions of Gen. St. 1860, c. 160, § 30.

The only question upon this count arises upon the ruling of the court upon that part of it which alleges that the assault and false imprisonment were committed without the consent and against the will of said C. A. T. Rice.

The instructions to the jury as to what would constitute a seizing and imprisonment against the will of the party were certainly sufficiently favorable to the defendants, as they would exclude all previous knowledge of their object or co-operation in forcibly taking the child from the custody and care of his teacher, on the part of the child himself.

But in our opinion a more stringent ruling upon this point would have furnished no legal ground for exception in matter of law. The party seized and imprisoned was a child of tender years. The legal custody and care of him was in his father. This had been judiciously settled in proceedings instituted by the mother asking for his custody. The adjudication settled the rights of the parties as to the custody of the child, and rendered illegal and criminal any attempt on the part of the mother or agents acting under her to obtain by violence the possession of him.

Being in the actual custody of his father, whose will alone was to govern as to his place of residence and the selection of a teacher and custodian, the child of nine years of age was incapable of assenting to a forcible removal from the custody of his teacher, and a transfer to other persons forbidden by law to take such custody. He was under illegal restraint, when taken away from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child. This view is in accordance with that taken in the case of State v. Farrar, 41 N. H. 53, upon a similar indictment. See also State v. Rollins, 8 N. H. 550. It is always so held in cases heard upon a habeas corpus issued upon the application of one of the parents, alleging imprisonment and restraint of the child, and seeking his restoration; and in the case first cited, it was held equally applicable to the case of an indictment for assault and imprisonment of a child of tender years.

The doctrine of the cases cited from the English reports, of indict-

[10] The statement of facts is abridged and part of the opinion is omitted.

ments for assaults upon female children, by indecent familiarities to which they assented, and in which by reason of such assent the acts done were held not to amount to assault, we think should not be extended to cases like the present, where the abduction from the lawful custody of the father by violence and strong hand is the substantial offence.

Without limiting the precise age in which a child would be held not to have the legal capacity to assent to such forcible abduction from the custody of the parent to whom such custody has been assigned by an order of this Court, the forcible taking away of a child of nine years of age, against the will of the father, or those to whom his father had committed him for nurture or education, will authorize a jury to find that the child was illegally restrained of his liberty, whatever may have been his apparent wishes or satisfaction in being withdrawn by force from his place of legal custody, and, in the language of the law, "his place of legal freedom," and placed under the care of those whose custody was illegal restraint. * * * The result is, therefore, that the verdict on the first count is sustained, and judgment may be entered thereupon, if the Attorney General shall enter a nol. pros. upon the other counts. * * *

OFFENSES AGAINST THE HABITATION

I. Arson [1]

REX v. GOWEN.

(King's Bench, 1786. 1 Leach [4th Ed.] 246, note.)

William Gowen was convicted before L. C. B. Skinner, of arson. The house he burned was rented by one Richard Dobney, named in the first count as the owner, and let by him from year to year to the parish officers of Laxfield, who paid the rent for it, and who were, at the time of burning the house, the persons named (individually) in the third count of the indictment. The prisoner was a parish pauper, and had been put into the house by the overseers to live there. He had the sole possession and occupation of it without paying any rent, and was resident therein with his family at the time the fact was committed, and on reference to the judges they all held that the prisoner had no interest in the house, but was merely a servant, and therefore it could not be said to be his house, but that the overseers had the possession of it by means of his occupation, and they accordingly held that he had been properly convicted.

REGINA v. RUSSELL.

(Berkshire Assizes, 1842. Car. & M. 541.)

Arson. The prisoner was indicted for maliciously setting fire to the house of Ann Wright, at Old Windsor.

On the part of the prosecution Miss Wright was called. She said: "The prisoner was in my service. Very early on the morning of the 4th of December, I perceived smoke and got up, and on my going down stairs I found a small fagot lighted and burning on the boarded floor of the kitchen, about four feet from the hearthstone. I took up the burning wood and put it into the grate. A part of the boards of the kitchen floor was scorched black, but not burnt. The fagot was nearly consumed, but no part of the wood of the floor was consumed.

CRESSWELL, J. The case of Regina v. Parker, 9 C. P. 45, 38 E. C. L. R. 29, is the nearest to the present, but I think it is distinguishable.

Carrington, for the prisoner. I submit that the wood of the floor

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 88-90.

being scorched is not sufficient to constitute this offense, as wood may be scorched without being actually on fire.

CRESSWELL, J. I have conferred with my Brother PATTESON, and he concurs with me in thinking that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offense that wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all. The prisoner must be acquitted.

Verdict—Not guilty.

II. Burglary [2]

PEOPLE v. DUPREE.

(Supreme Court of Michigan, 1893. 98 Mich. 26, 56 N. W. 1046.)

GRANT, J.[3] The respondent was convicted of burglary under section 9132, How. Ann. St. 1882. * * *

The theory of the prosecution was that the respondent, when in the shop, either on the 6th or 7th of October (the court, in its charge referred to the date as Friday, October 7th), raised the window just enough to prevent the bolt from entering the slot, and there was evidence to sustain it. It is insisted that even if this was so, and the respondent raised the window on the following night, it did not establish the crime of burglary. We cannot agree with this contention. It is said in Dennis v. People, 27 Mich. 151:

"If an entry is effected by raising a trap-door, which is kept down merely by its own weight, or by raising a window kept in its place only by pulley weight, instead of its own, or by descending an open chimney, it is admitted to be enough to support the charge of breaking; and I am unable to see any substantial distinction between such cases and one where an entry is effected through a hanging window over a shop door, and which is only designed for light above, and for ventilation, and is down, and kept down by its own weight, and so firmly as to be opened only by the use of some force, and so situated as to make a ladder, or something of that kind, necessary to reach it for the purpose of passing through it."

We think the doctrine there enunciated covers the present case. If there had been no bolt, and respondent had raised the window and en-

[2] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 91–93.

[3] Part of the opinion is omitted.

tered in the nighttime, under all the authorities, he would have been guilty of burglary. Upon what reason can it be said that his removal of the bolt, or his raising the window a fraction of an inch, in the daytime, changes the character of his offense? If the owner had failed to see that the bolts were in place, or if something had been accidentally placed upon the window sill, which was of slight thickness, but sufficient to prevent the bolts from entering the slots, the raising of the window would have been a sufficient breaking to support the charge. Rex v. Hyams, 7 Car. & P. 441; State v. Reid, 20 Iowa, 421; Lyons v. People, 68 Ill. 280. How can the act be relieved of criminality by secretly fixing the window in the daytime so that the bolt or lock will not be effective, and thus render the perpetration of the crime more easy and certain? There is no reason in such a rule. In Lyons v. People, the door was left unlocked, and the court was requested to instruct the jury that, in order to constitute the crime, it must appear that the door was secured in the ordinary way. The Supreme Court, in determining the question, said:

"We are not aware of any authority which goes to the extent of these instructions. To hold that the carelessness of the owner in securing and guarding his property shall be a justification to the burglar or thief would leave communities very much to the mercy of this class of felons. It would in effect be a premium offered for their depredations, by the removal of the apprehension of punishment. Whether property is guarded or not, it is larceny in the thief who steals it. When a door is closed, it is burglary for any one with felonious intent to open it and enter the house in the nighttime without the owner's consent; and it makes no difference how many bolts and bars might have been used to secure it, but which were neglected."

The language of the court was perhaps too broad in stating that if the window was raised any distance, but was not sufficient to permit the defendant to enter, and he raised it further, it would be breaking in the meaning of the law; but the entire evidence was to the effect that it was raised so little as not to attract the notice of the occupant. We therefore think that the jury could not have been misled by the language. * * *

Judgment affirmed.

LE MOTT'S CASE.

(Old Bailey, 16—. Kelyng, 42.)

At the Sessions I inquired of Le Mott's Case, which was adjudged in the time of the late troubles, and my Brother WYLD told me that the case was this: That thieves came with intent to rob him, and finding the door lockt up, pretending they came to speak with him, and thereupon a maid servant opened the door, and they came in and rob-

bed him, and this being in the nighttime this was adjudged burglary and the persons hanged, for their intention being to rob, and getting the door open by a false pretense, this was in fraudem legis, and so they were guilty of burglary, though they did not actually break the house, for this was in law an actual breaking, being obtained by fraud to have the door opened, as if men pretend a warrant to a constable, and bring him along with them, and under that pretense rob the house, if it be in the night, this is burglary.

STATE v. CRAWFORD.

(Supreme Court of North Dakota, 1899. 8 N. D. 539, 80 N. W. 193, 46 L. R. A. 312, 73 Am. St. Rep. 772.)

John Crawford was indicted for burglary in the third degree and acquitted by direction of the court, and the state appeals.

WALLIN, J.[4] * * * There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about 800 bushels of wheat, and that in the nighttime three holes were bored with a two-inch auger through the walls of the granary and into one of the wheat bins. The three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the state had made out a prima facie case when the evidence closed and the state rested its case. * * *

Counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the state failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger, guided by the person who bored the holes, passed through the walls of the granary into the mass of wheat, therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled

[4] Part of the opinion is omitted.

the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited. * * *

The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry. * * *

STATE v. MOORE.

(Superior Court of Judicature of New Hampshire, 1841. 12 N. H. 42.)

Indictment for breaking and entering the house of Isaac Paddleford, at Lyman, in the nighttime, on the 19th day of November, 1840, with intent to steal, and stealing therefrom certain pieces of money.

It appeared in evidence that the prisoner went to the house, which is a public house, and asked for and obtained lodging for the night, and that he took the money from a box in the desk in the barroom in the course of the night.

The jury were instructed that upon this indictment the prisoner might be convicted of burglary, of entering in the nighttime and stealing, or of larceny; that if the door of the barroom were shut, and the prisoner left his own room in the nighttime, and opened the door of the barroom, or any other door in his way thereto, except his own door, and stole the money, he was guilty of burglary; but that if he left his own room in the night, and stole the money from the barroom, without opening any door on his way thereto, except his own door, he was guilty of entering in the nighttime and stealing. The jury found the prisoner guilty of entering in the nighttime and stealing. * * *

GILCHRIST, J.[5] * * * It is said that, as the prisoner was lawfully in the house, he cannot be convicted of the offense of entering in the nighttime with intent to steal. * * *

An innkeeper, holding out his inn "as a place of accommodation for travelers, cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them." Markham v. Brown, 8 N. H. 528, 31 Am. Dec. 209. As he has authority to enter the house, so he may enter any of the common public rooms. Markham v. Brown. The barroom of an inn is, from universal custom, the most public room in the house; and whether a traveler may, without permission, enter any of the private rooms or not, he has clearly a right to enter the barroom. * * *

[5] The statement of facts is abridged and part of the opinion is omitted.

"It is not a burglarious breaking and entry, if a guest at an inn open his own chamber door, and takes and carries away his host's goods, for he has a right to open his own door, and so not a burglarious breaking." 1 Hale, P. C. 553, 554.

If a burglary could not be committed because the party had a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful.

For these reasons, the judgment of the court is that the verdict be set aside and a

New trial granted.

QUINN v. PEOPLE.

(Court of Appeals of New York, 1878. 71 N. Y. 561, 27 Am. Rep. 87.)

FOLGER, J.[a] The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. 2 Rev. St. (1st Ed.) p. 668, pt. 4, c. 1, tit. 3, § 10, subd. 1. The crime, as there defined, consists in breaking into and entering in the nighttime, in the manner there specified, the dwelling house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering and the criminal intent. The questions mooted in this court are whether it is legally proper, in an indictment for burglary of a dwelling house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling house within the intent of the statute. * * *

As to the second question: It is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence upstairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling rooms, there was not a breaking into a dwelling house,

[a] The statement of facts and parts of the opinion are omitted.

and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point, I will first say, that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same. * * *" 2 Russ. on Cr. p. 1, § 785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling houses or a part thereof, so as to be the subject of burglary; for, as far as the Revised Statutes as already cited are concerned, what was a dwelling house or a part thereof at common law must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. Case of Gibson, Mutton & Wiggs, Leach's Cr. Cas. 320 (Case 165), recognized in People v. Parker, 4 Johns. 424. In the case from Leach, there was a shop built close to a dwelling house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the courtyard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They were all of the opinion that the shop was to be considered a part of the dwelling house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling house. The case in Johnson's Reports, supra, is also significant, from the facts relied upon there to distinguish it from the case in Leach, supra. Those facts were that the shop entered, in which no one slept, though on the same lot with the dwelling house, was 20 feet from it, not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both, so as to bring them within one inclosure. Therefore the case was within that of The King v. Garland, 1 Leach, Cr. Cas. 130 (or 171), Case 77.

It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did deem all outhouses, when they were within the same inclosure as the dwelling house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose,

and were thus essential or convenient for the enjoyment of the dwelling house as such. Gibson's Case, supra, would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling house. The books have many cases to the same end. Rex v. Gibbons & Kew, Russ. & Ry. 442, the case of a shop; Robertson's Case, 4 City Hall Rec. 63, also a shop, with no internal communications with the dwelling house; Rex v. Stock et al., Russ. & Ry. 185, a counting room of bankers; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714, one room in a house used as a wareroom for goods; Rex v. Witt, Ry. & M. 248, an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity, or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings. Rex v. Jenkins, Russ. & Ry. 244; Rex v. Westwood, Id. 495, where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes.

It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error (State v. Langford, 12 N. C. 253; State v. Jenkins, 50 N. C. 430; State v. Bryant Ginns, 1 Nott & McC. [S. C.] 583), though, in the case last cited, It is conceded that if a store is entered, which is a part of a dwelling house, by being under the same roof, the crime is committed; and it must be so, if it is the circumstance of midnight terror in breaking open a dwelling house which is a chief ingredient of the crime of burglary, and it is for that reason that barns and other outhouses, if in proximity to the mansion house, are deemed quasi dwelling houses, and entitled to the same protection (State v. Brooks, 4 Conn. 446–449). Coke, 3 Inst. 64, is cited to show that only those buildings or places which in their nature and recognized use are intended for the domestic comfort and convenience of the owner may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse"—i. e., be employed or engaged with; Richardson's Dic. "in voce"—"being a parcel of a mansion house, or not parcel, is taken for a mansion house." So Hale is cited (1 P. C. 558); and it is there said that "to this day it is holden no burglary to break open such a shop." But what does he mean by that phrase? That appears from the authority which he cites, Hutton's Reps. 33, where it was held no burglary to break and enter a shop, held by one as a tenant in

the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed, and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling house. But Hale also (1 P. C. 557) cites as law the passage from the Institutes above quoted. Other citations from text-books are made by the plaintiff in error. They will be found to the same effect, and subject to the same distinction as those from Coke and Hale. And see Rex v. Gibbons et al., supra; Rex v. Richard Carroll, 1 Leach, Cr. Cas. 272 (Case 115).

That there must be a dwelling house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error of Rex v. Harris, 2 Leach, Cr. Cas. 701, Rex v. Davies, alias Silk, Id. 876, and the like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling house, but held the crime committed if the building entered was within the same fence or inclosure as the building slept in. And the dwelling house in which burglary might be committed was held formerly to include outhouses—such as warehouses, barns, stables, cow houses, dairy houses—though not under the same roof or joining contiguous to the house, provided they were parcel thereof. 1 Russ. on Cr. *799, and authorities cited. Any outhouse within the curtilage or same common fence with the dwelling house itself was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or homestall. State v. Twitty, 2 N. C. 102; State v. Wilson, Id. 242. See, also, State v. Ginns, 1 Nott & McC. (S. C.) 585, where this is conceded to be the common law. See note "a" to Garland's Case, supra.

It seems clear that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling house. * * *

I am brought to the conclusion that upon the facts proven the plaintiff in error was properly indicted and convicted of the statutory crime of burglary in the first degree. * * *

ALLEN, MILLER, and EARL, JJ., concur. RAPALLO and ANDREWS, JJ., dissent. CHURCH, C. J., not voting.

Judgment affirmed.

OFFENSES AGAINST PROPERTY

I. Larceny [1]

1. Property That May be Stolen

HAYWOOD v. STATE.

(Supreme Court of Arkansas, 1883. 41 Ark. 479.)

ENGLISH, C. J.[2] Horace Haywood was indicted in the Circuit Court of Sebastian County, Ft. Smith District, for larceny. There were three counts in the indictment. The first count charged, in substance, that said Horace Haywood, on the twenty-ninth of April, 1883, at, etc., one reclaimed and tame mocking-bird, of the value of twenty-five dollars, and one bird cage of the value of one dollar, of the property, goods and chattels of Ellen Lane, etc., did steal, take, and carry away, etc. * * *

Larceny, at common law, is defined to be "the felonious taking and carrying away of the personal goods of another." Blackstone.

By the common law there can be no larceny of animals feræ naturæ, or wild animals, unreclaimed. When reclaimed they become the subject of this offense, provided they are fit for food, not otherwise.

But the English courts made exceptions to the rule, that reclaimed animals, to be the subject of larceny, must be fit for food. Thus the tamed hawk was held to be the subject of larceny, though unfit for food, because it served to amuse the English gentlemen in their fowling sports. So reclaimed honey bees were made an exception, because, though not fit for food themselves, their honey is.

Under decisions of English and American courts, made upon the common law definition of larceny, Mr. Bishop classes the following animals, when reclaimed, as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges and fish suitable for food, including oysters.

To which might be safely added wild turkeys, geese, ducks, etc., when reclaimed.

Of those animals which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys,

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 94–98.

[2] The statement of facts is abridged.

polecats, ferrets, squirrels, parrots, singing birds, martins and coons. In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food.

Iowa is credited with the decision, Warren v. State, 1 G. Greene (Iowa) 106, that coons are unfit for food, and therefore, by the common law, not the subject of larceny, when reclaimed.

Among the colored people of the South the coon, when fat in the fall and winter, is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste.

On the whole subject, see 2 Bishop on Criminal Law (6th Ed.) §§ 757, 781, and notes.

Every species of personal property was not the subject of larceny at common law. For example, dogs were treated as personal property, and on the death of their owner, if not disposed of by will, went to his executor or administrator as such. So the owner of a dog could bring a civil action against one who injured or took the animal.

So choses in action, as bonds, bills, notes, etc., were classed as personal property, and subjects of the action of detinue, etc., but larceny could not be committed of them.

Under the technical rules of the ancient common law, says Mr. Bishop, prevailing still, except as expanded by statutes, larceny was restricted as to the property of which it could be committed, as well as in some other respects, within limits too narrow to meet the requirements of a more refined and commercial age. Consequently statutes in England and in the United States have greatly enlarged the common law doctrine. Id. § 761.

The provisions of the larceny statute of this State are very broad and comprehensive. The first section defines the crime thus: "Larceny is the felonious stealing, taking and carrying, riding, or driving away the personal property of another." This perhaps is not more comprehensive than the common law definition.

The second section declares that "larceny shall embrace every theft which unlawfully deprives another of his money or other personal property, or those means and muniments by which the right and title to property, real or personal, may be ascertained."

The third section makes any bank note, bond, bill, note, receipt, or any instrument of writing whatever, of value to the owner, the subject of larceny.

The fourth section declares that "the taking and removing away any goods or personal chattels of any kind whatever, with intent to steal the same, whether the articles stolen be in the immediate possession of the owner or not, unless it shall appear that the owner has abandoned his claim thereto, shall be deemed larceny." Gantt's Digest, §§ 1352–1357.

Under similar statutes of New York and Tennessee, it has been decided that dogs are the subject of larceny. Mullaly v. People, 86

N. Y. 365; State v. Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81. Though in the States where the common law has not been enlarged by statute, the rulings have been otherwise.

In Mullaly v. People, it was well said by Justice Earle, who delivered the opinion of the Court, that "in nearly every household in the land can be found chattels kept for the mere whim and pleasure of its owner; a source of solace after serious labor, exercising a refining and elevating influence; and yet they are as much under the protection of the law as chattels purely useful and absolutely essential."

The reclaimed mocking bird in question was no doubt personal property. The owner could have brought trespass against the thief, who invaded her portico at night, and deprived her of the possession of her songster, which she prized above price, and she could have maintained replevin against the person to whom he sold it, had he refused to surrender it to her.

The market value of the bird was, perhaps, more than ten times greater than that of the cage, which was the subject of petit larceny. To hold that larceny might be committed of the cage, but not of the bird, would be neither good law nor common sense.

Affirmed.

COMMONWEALTH v. STEIMLING.

(Supreme Court of Pennsylvania, 1893. 156 Pa. 400, 27 Atl. 297.)

Mr. Justice WILLIAMS.[8] * * * It appeared on the trial that Bower, the prosecutor, was the owner of a farm which was crossed by Mahanoy creek. Some distance up the stream coal mines were in operation and had been for many years. The culm and waste from the mines and breaker, which had been thrown into, or piled upon the bank, of the creek, had been carried down the stream by the current and the floods, and deposited in the channel and along the shores in considerable quantities. This material, having been abandoned by its original owners, belonged to him on whose land the water left it. The water, dropping the heavy pieces first and carrying the smaller particles and dust along in the current, served as a screen; and as the result of this process considerable quantities of coal suitable for burning were lodged along the channel and the banks of the stream throughout its course over the prosecutor's farm. The defendant, descending the stream with a flatboat, entered upon the lands of Bower and began to gather coal from the surface. He was provided with a scoop or shovel made of strong wire or iron rods, with which he gathered up the coal. The sand and gravel passed through the meshes of the scoop, leaving

[8] The trial court's charge to the jury and a part of the opinion of Williams, J., are omitted.

the pieces of coal within it. When the gravel was all sifted out, the cleaned coal was emptied upon the flatboat. This process was continued until a boat load was obtained. The boat was then towed or pushed to some bins on the shore opposite to Bower's house, and the coal was transferred from the boat to the bins. This was repeated until from 8 to 12 tons of coal had been gathered, cleaned, deposited on the boat, transported to the bins, and unloaded. This coal was afterwards delivered to purchasers, or taken for consumption, from the bins.

Here was a taking with intent to carry away and convert, a carrying away, and an actual conversion, which the commonwealth held sustained the indictment for larceny. The learned judge, however, instructed the jury that the process of collecting, cleaning, loading upon the flatboat, transporting to the bins, and unloading the coal into them must be regarded as one continuous act, like the act of him who tears a piece of lead from a building and carries it off, or who, passing an orchard, plucks fruit and takes it away, and that the defendant was, therefore, a trespasser only. The distinction in the mind of the learned judge was that between real and personal estate. The coal lying upon the surface he held to be real estate. The lifting it up in the shovel was on this theory a severance, which forcibly changed its character and made it personal. The loading into the flatboat, the transportation to the bins, and unloading of the boat, all of which acts were done within the lines of the prosecutor's land, and occupied hours of time for each boat load, were so connected with the severance as to make but a single act. For this reason he held that the defendant was guilty of a trespass only. The common law did distinguish between things that are connected with or savor of the real estate and those that are personal goods. An apple growing upon a tree was connected with the land by means of the tree that bore it, and so held to partake of the nature of the land, and to be real estate. One who plucked it from the tree, and at once ate or carried it away, was therefore a trespasser; but if he laid it down, and afterwards carried it away, so that the taking and the asportation were not one and the same act, then, if the carrying away was done animo furandi, the elements of larceny were present.

Blackstone tells us, in volume 4, p. 233, of the Commentaries, that larceny cannot be committed of things that savor of the realty, because of "a subtility in the legal notions of our ancestors." He then explains the subtile distinction as follows: "These things (things that savor of the realty) were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken

from their proprietor in their newly acquired state of mobility." But he explains that, if the act of severance and that of carrying away be separated, so that they do not constitute "one and the same continued act," the subtile distinction between personal goods and those that savor of the real estate ceases to protect the wrongdoer from a criminal prosecution, and a charge of larceny can be sustained. The question whether this coal, lying loose upon the surface, like other drift of the stream, was real or personal estate, does not seem to have been raised in the court below, and it is not before us.

The real question presented is whether this case upon its facts is one for the application of the common-law rule. Have we here a severance and an asportation that constitute "one and the same continuous act?" If the picking of the coal from the surface be treated as an act of severance, we have next the act of cleaning and sifting, then the deposit of the cleaned coal upon the flatboat little by little, then the transportation of the boat load to the bins, and then the process of shoveling the coal from the boat into the bins.

The acts, occupying considerable time for each boat load, were all done within the inclosures of the prosecutor. It is as though one should come with team and farm wagon into his neighbor's corn field and pluck the ears, load them into the wagon, and, when the wagon would hold no more, draw the corn away to his own corn house, and then return again, and continue the process of harvesting in the same manner until he had transferred his neighbor's crop to his own cribs. If such acts were done under a bona fide claim of title to the crop, they would not amount to larceny; but, if done animo furandi, all the elements of larceny would be present. In the case before us it is conceded that the coal belonged to Bower, and was in his possession as part of his real estate. The defendant entered his lands for the purpose of collecting coal and carrying it away. He makes no bona fide claim of title, no offer to purchase, sets up no license, but rests on the proposition that, like the man who plucks an apple from a tree and goes his way, he is liable only as a trespasser. If this be true, he could gather the coal from Bower's land as often as the stream made a sufficient deposit to justify the expenditure of time necessary to gather, clean, transport, and put it in bins. Upon the same principle he might gather all the crops growing on Bower's farm as they matured, and by hauling each load away when it was made up, defend against the charge of larceny, on the ground that the gathering from the tree, the stalk, or the hill, the loading into wagons, and the carrying of the loads away, though occupying hours for each load and many days for the crop, was "one and the same continuous act" of trespass. We cannot agree to such an extension of the common-law rule, but are of the opinion that this case should have gone to the jury on the existence of the animo furandi.

2. The Trespass in Taking

(A) Larceny by Bailee

REX v. SEMPLE.

(Old Bailey, 1786. 1 Leach [4th Ed.] 420.)

At the ensuing session the prisoner, J. G. Semple, was again indicted for the same offense [larceny], before Adair, Recorder; present, Mr. Justice Gould.

The following facts appeared in evidence: The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighborhood under the name of Maj. Harrold, and had frequently hired chaises from the prosecutor as the occasion required, and for which he had always paid with great punctuality. On the 1st of September, 1785, the prisoner hired a post chaise of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during the time that he kept the chaise, and a price of fifty guineas was talked about in case he should determine to purchase the chaise on his return to London; but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner fetched the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to the Crown and Cushion at Uxbridge, where he ordered a pair of horses, and went from thence to the Duke of Portland's, and returned. He took fresh horses at the Crown and Cushion, but where he went with the chaise afterwards did not appear. The fact was he never returned it to Mr. Lycett, nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. Feltham, in Fleet street, upon a suspicion of having, under false pretenses, defrauded him of a quantity of ladies' hats.

Garrow, for the prisoner, submitted to the court that, admitting the whole of the evidence to be true, the offense did not amount to felony, and he endeavored to distinguish the case from that of Pear's Case, 1 Leach, 212, and Aickle's Case, 1 Leach, 294, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them, but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was not hired for any definite length of time, or to go to any certain place, and the mere understanding that

it was for three weeks or a month, for the purpose of making a tour round the North, made no part of the contract. He had hired it for such a length of time as he should please to keep it, at a certain stipulated price for each day; and, it being delivered to him upon those terms, he had the entire possession of it in himself, and was answerable in damages for its detention, or for any injury which might happen to it during his absence. But, supposing the contract should be thought not to extend beyond the three weeks or a month; it is clear that during that time he had at least the legal possession, and then no intention to convert it wrongfully to his own use, arising afterward, whether from necessity or dishonesty, will make the withholding it felony, for the animus furandi must exist at the time the property is obtained. In all the leading cases upon this subject of constructive felony, there has always been some evidence of a tortious conversion; but in this case it has not been proved that the prisoner has disposed of the chaise. It may be at this very moment in his possession, for anything that appears to the contrary, and a conversion cannot be inferred from his having neglected to return it.

THE COURT. The court is bound by the determination of former cases. It is now settled that the question of intention is for the consideration of the jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of Pear's Case and the other decisions which the judges have made upon the subject of constructive felony. If there was a bona fide hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the bona fide contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it, and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful. But, on the other hand, if the hiring was only a pretense made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be felony. The case of The King v. Pear was very solemnly debated at Lord Chief Justice De Grey's house; and the unanimous opinion of the judges was at last that the direction given to the jury by the learned judge who tried the prisoner was right. The most important part of the argument turned upon the consideration whether the delivery of the horse to Pear had in law divested the owner either of his property or the possession of it. The question left with the jury was whether the contract was meant fairly, or whether it was a mere color and pretense. The jury found that it was a mere color and pretense, and upon that finding the judges determined the taking

to be felony, because it is an established principle of law that the possession of property cannot be obtained through the medium of a fraud. But it has been attempted to distinguish the present case from The King v. Pear: First, that the hiring in this case was indefinite, but that in The King v. Pear it was certain and limited. The time cannot be material in questions of this nature. Pear hired the horse in the morning, under the pretense of going to Sutton, in Surrey, and to return in the evening; but, as the hiring was found to be felonious, the law of the case must have been the same, although it had appeared that the hiring was for two days, a week, a month, or any other given time —nay, if the time had been left entirely unlimited. The circumstances of the time being long or unsettled may, indeed, render the proof of guilt more difficult, but cannot alter the law of the case. Secondly, it is said that this case differs from The King v. Pear, because it was proved that Pear had sold the horse, and therefore had converted it to his own use, but that in the present case no proof has been given that the prisoner has sold or otherwise converted the chaise. Proof of actual conversion certainly is not necessary, but the jury must judge of it from the circumstances of the case. If the prisoner, at any time before the prosecution was commenced, had offered to restore the chaise to the owner, or to pay him for it, such conduct would have been evidence of an honest intention when he originally hired it, and would have reprobated the idea of a fraudulent design. But he hires the chaise for a month, and a year passes, and neither the chaise nor the man are heard of until he is taken. There is no evidence even at this moment that the chaise is forthcoming, nor does any one pretend to know where it is. This, therefore, raises a presumption against the prisoner, which it is incumbent on him to repel; and, if he cannot, it will be for the consideration of the jury, under all the circumstances of the case, whether they think he has feloniously disposed of it, or otherwise converted it to his own use. In their determination of this point they must recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the redelivery of the chaise formed any part of the contract, the nondelivery of it must necessarily form a part of their consideration. They will then consider whether the nondelivery is sufficient evidence to satisfy their consciences that he has converted it to his own use. These two considerations will naturally lead to a third, viz., whether the property thus converted was originally obtained with a felonious design, which will carry them back to the instant of time that he obtained possession of it; and, if they should find the original hiring was felonious, the most ingenious subtlety cannot distinguish this case from that of The King v. Pear. There is a case in Kelynge of a person who took a lodging in a house, and afterwards at night, while the people were at prayers, robbed them. The jury found that the intention of taking the lodging was to commit the felony, and the

judges determined that this was burglary. There was also a case determined very lately by the judges. A man ordered a pair of candlesticks from a silversmith to be sent to his lodgings. They were sent to his lodgings, with a bill of parcels; but he contrived to send the servant back, and to keep the goods, and this was held to be felony, although they were delivered with the bill of parcels, under an expectation of being paid the money, for the jury found that it was a pretense to purchase, with intention to steal.

The question of original intention was left with the jury, and they found the prisoner guilty. A motion was made in arrest of judgment, but it was overruled, and he received sentence of transportation for seven years.

(B) Custody Not Possession

PEOPLE v. MONTARIAL.

(Supreme Court of California, 1898. 120 Cal. 691, 53 Pac. 355.)

Louis Montarial was convicted of grand larceny in stealing certain moneys from one Paillac, and appeals. The evidence showed that Montarial and Paillac were roommates, and that the latter gave the defendant the money in question, done up in a package, to be placed for safe-keeping in defendant's trunk. Defendant placed the money in the trunk, where it remained for over two years. Defendant carried the key, but always unlocked the trunk at the request of Paillac. Defendant had no authority to handle the package except in the presence of Paillac, and then only for the purpose of handing it to Paillac or replacing it at his direction.

VAN FLEET, J.[4] * * * Taking the whole evidence together, with all it tends to show, and we are satisfied that it does not establish a bailment or intrusting of the money to defendant. As we regard it, the evidence does not show that Paillac ever in fact really parted with the possession of his money. While it was locked in the trunks of defendant, to which the latter retained the keys, the trunks were at all times as much in the possession of Paillac, and with practically the same freedom of access to the latter, as in that of the defendant. In legal contemplation the use of the trunks was loaned or given to Paillac as a place for keeping his money. The mere fact that defendant carried the keys is not a material consideration. As we have seen, the

[4] The statement of facts is abridged from the opinion of the court, and part of the opinion is omitted.

keys were always forthcoming when demanded by Paillac for access to his money; and the money was, therefore, to all practical intents and purposes, as much under his personal supervision and protection as of defendant. Indeed, more so, since the latter had no right or authority to tamper with it in any way, except as directed by its owner.

Much is made by defendant of the fact that Paillac testified that he "intrusted" the money to defendant; and it is urged that this constitutes embezzlement, because that offense consists of "the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. But, to reach the meaning of the witness, his expressions must be read in the light of his whole testimony and all the circumstances; and when so read it is clear that his money was not intrusted to the keeping of the defendant in a manner to bring it within the definition of embezzlement. Defendant let Paillac have the use of his trunks as a place of safety for his property, and the only dominion defendant rightfully exercised over it was a perfunctory handling of it in the presence of the owner. The case, although differing in its circumstances, is not to be distinguished in principle from that of People v. Johnson, 91 Cal. 265, 27 Pac. 663, where it is held that, where the owner puts his property into the hands of another to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it animo furandi is larceny, and not embezzlement. See, also, 2 Russell on Crimes (8th Am. Ed.) 21. * * *

We are satisfied that the judgment should be affirmed.

(C) Larceny by Finder

REGINA v. THURBORN.

(Court for Crown Cases Reserved, 1849. 1 Den. C. C. 387.)

The prisoner was tried before Parke, B., at the Summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner; nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner,

and had dropped it accidentally. He then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe and did believe it to be the prosecutor's property before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned Baron was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by PARKE, B.:

A case was reserved by PARKE, B., at the last Huntingdon Assizes. It was not argued by counsel, but the judges who attended the sitting of the court after Michaelmas Term, 1848, namely, the LORD CHIEF BARON, PATTESON, J., ROLFE, B., CRESSWELL, J., WILLIAMS, J., COLTMAN, J., and PARKE, B., gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The learned Baron here stated the case.] [5] * * * *

In the present case there is no doubt that the bank note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore, though he took it with the intent, not of taking a partial or temporary, but the entire, dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use, by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted, so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times, or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, "Quia Dominus rerum non apparet ideo cujus sunt incertum est," and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported

[5] Part of the opinion is omitted.

cases on this subject, some where the owner of goods may be presumed to be known, from the circumstances under which they are found. Amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocketbook, found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict. Some cases appear to have been decided on the ground of bailment, determined by breaking bulk, which would constitute a trespass, as Wynne's Case, Leach, C. C. 460; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny, where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills with the owner's name upon them.

This subject was considered in the case of Merry v. Green, 7 M. & W. 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then, as soon as he knew whose it was, took it, animo furandi, as, in order to constitute a larceny, the taking must be a trespass, and it was asked when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the report was used—that in such a case the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use, animo furandi.

It is quite a mistake to suppose, as Mr. Greaves has done (volume 2, c. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W. 623, which, taken alone, seems to be applicable to every case of finding unmarked, as well as marked, property. It was meant to apply to the latter only.

The result of these authorities is that the rule of law on this subject seems to be that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with the intent to take the entire dominion over them, really be-

lieving, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as, indeed, in the application of all fixed rules, questions of some nicety may arise; but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent; in others, appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do at the time of taking it; and, if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, animo furandi. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case: The first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise, from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it, animo furandi, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not. It was dispunishable, as we have already decided, and, though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.

(D) Consent of Owner to Part with "Property" as Well as Possession

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REGINA v. STEWART et al.

(Kent Assizes, 1845. 1 Cox, C. C. 174.)

The prisoners were indicted for larceny, under the following circumstances: They passed for husband and wife, and, having taken a house at Tunbridge Wells, Mrs. Stewart went to the shop of the prosecutor, selected the goods in question to the amount of £10, and ordered them to be sent to her home. The prosecutor accordingly dispatched the goods by one Davies, and gave him strict injunction not to leave them without receiving the price. Davies, on arriving at the house, told the two prisoners he was instructed not to leave the goods without the money, or an equivalent. After a vain attempt on the part of K. Stewart to induce Davies to let him have the property on the promise of payment on the morrow, he (Stewart) wrote out a check for the amount of the bill and gave it to Davies, requesting him not to present it till the next day. It was drawn on the London Joint Stock Bank, Prince's Street, London, and Davies, having left the goods, returned with the check to his employers. It was presented at the Bank, in London, the next morning, when it was dishonored for want of effects. It was also proved that, although the prisoner had opened an account at the said bank, it had been some time before overdrawn, and several of his checks had been subsequently dishonored. * * *

Jones, Serjt., then submitted that the charge of larceny against Kidman Stewart could not be sustained. The shopman parted, not only with the possession of the goods, but also with the property in them. Nor was any false representation made to him to induce him so to do. The prisoner requested that the check might not be presented until the next day; but it was presented on the next morning, and had never been taken to the banking house since. Although there were no funds there in the morning, it did not follow that provision might not have been made for the check in the course of the day. This is like the case of R. v. Parker, 7 C. & P. 825, where the prisoner was charged with falsely pretending that a postdated check, drawn by himself, was a good and genuine order for £25, whereby he obtained a watch and chain. There the prisoner represented, as here, that he had an account with the bank, and had authority to draw the check, both which were proved to be false, and the court held the case one of false pretenses.

ALDERSON, B. It is for you to show that the prisoner had reasonable ground for believing that the check would be paid. The case

seems to me to approach more nearly to R. v. Small, 8 C. & P. 46, than to R. v. Parker. In the former, a tradesman was induced to send his goods by a servant to a place where he was met by the prisoner, who induced the servant to give him the goods in exchange for a counterfeit crown piece, and it was held to be larceny. If the owner of goods parts with the possession, he meaning to part also with the property, in consequence of a fraudulent representation of the party obtaining them, it is not larceny, but a mere cheat. But if the owner does not mean to part even with the possession, except in a certain event, which does not happen, and the prisoner causes him to part with them by means of fraud, he (the owner) still not meaning to part with the property, then the case is one of larceny. Here, if the owner had himself carried the goods and parted with them, as the servant did, no doubt it would have been a case of false pretenses; or, if the servant had had a general authority to act, it would have been the same as though the master acted. But in this instance he had but a limited authority, which he chose to exceed. I am of opinion, as at present advised, that if the prisoner intended to get possession of these goods by giving a piece of paper, which he had no reasonable ground to believe would be of use to anybody, and that the servant had received positive instructions not to leave the articles without cash payment, the charge of larceny is made out.

(E) Delivery by Mistake

REGINA v. HEHIR.

(Court for Crown Cases Reserved. [1895] 2 Ir. R. 709.)

Denis Hehir was indicted for the larceny of a £10 note, of the goods and chattels of one John Leech. It appears from the evidence that this £10 note was handed by Leech to Hehir in part payment of a sum of £2. 8s. 9d. due by the former to the latter, and that, at the time when it was so handed, both Leech and Hehir believed it to be a £1 note. It further appears that, after the lapse of a substantial period of time, Hehir became aware that the note was one for £10, whereupon, in the words of the case, "he fraudulently and without color of right intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note and disposed of the proceeds thereof."

The case was left by the Lord Chief Baron to the jury (who found the prisoner guilty), in order to obtain an authoritative decision upon a question upon which the Court for Crown Cases Reserved in England was equally divided in The Queen v. Ashwell, 16 Q. B. D. 190. That question he reserved for this court in the following words: "Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the animus furandi when Leech handed him the £10 note?" * * *

GIBSON, J.[6] * * * In the present case there was a physical delivery, in intended performance of a contract, without knowledge or intent on the part of the owner to give, or on the part of the taker to accept, possession of the particular chattel actually delivered. Until discovery by the taker, the legal possession seems not to be divested out of the owner, if it be not in suspense. Until knowledge and election, the law ought not to attribute to the taker an intent to divest the owner's possession without his consent, which would be a wrongful act, or to accept a possession which in case of some chattels might be onerous. The physical occupation raises an inference of legal possession, just as it does of property of which possession is part and symbol; but common error, which rebuts contract, also rebuts that inference. The character of the physical possession is ambiguous until discovery, and ought to be interpreted in an innocent rather than a tortious sense. If, upon discovery, the taker elects to return the chattel to the proper custody, as it is his duty to do, his previous relation to the chattel is thereby determined, as resembling custody rather than possession. On the other hand, if he then decides to misappropriate, knowing that there has been no consent by the owner, one of two views is possible. His possession up to that time may be regarded as incomplete, and is then finally determined by his tortious election as wrongful throughout. Woodward's Case, L. & C. 122. Or he may be regarded as then and there for the first time taking out of the owner's possession the chattel which is to be considered as mislaid rather than as lost. During the suspense period, his acts done in innocent ignorance are excused; but the excuse, founded not on consent, but on misleading, applies only as far as he is misled, and does not operate when, knowing the mistake, he deliberately commits a tort by taking possession of and converting the chattel.

The second question for consideration is the lawfulness of possession, where the delivery has taken place under a common mistake of such a character as to exclude the mental agreement necessary to the formation of a contract. The mistake may be as to the identity of the transferee (Cundy v. Lindsay, 3 App. Cas. 459), or as to the iden-

[6] The facts are printed from the opinion of Madden, J. Part of the opinion of Gibson, J., and the opinions of Holmes, Murphy, Johnson, Andrews, and O'Brien, JJ., Palles, C. B., and P. O'Brien, L. C., are omitted.

tity of the subject-matter of contract, as in Middleton's and Ashwell's Cases, or a mistake compounded of both these elements.

It may be taken that a consent to possession obtained by fraud or force, animo furandi, is unavailing, and that possession under it would be unlawful and trespassory. It is also certain that in such a case as we have here to deal with property cannot pass. If common mistake prevents contract, and property cannot pass, why should possession, which is part and symbol of property, pass, when neither party intended to divorce possession from property? Physical delivery by owner to taker may be evidence of consent; but delivery can hardly be conclusive and irrebuttable proof of an intelligent transfer of possession, when neither party intends to make or accept such transfer. * * *

This question of consent is one of substance, and not form. It cannot be treated as disposed of by the fact of physical delivery without more. A delivery by a man in delirium or asleep, or hypnotized, would be void, because unaccompanied by intelligent volition. The mistake, as it occurs to me, made by many of the learned judges in Ashwell's Case, 16 Q. B. D. 190, seems much the same as that which was corrected in Reg. v. Dee, 14 L. R. Ir. 468. A consent must be to the particular act or thing and to the particular person. A consent to intercourse obtained by fraudulent personation from a married woman, in the belief that the act was marital connection with her husband, was, as there pointed out, no consent at all to an act of adultery with a stranger. This absence of consent does not, I think, depend on fraud. It is a conceivable case that a married woman might, in the dark, submit to a man whom she believed to be her husband, without guilty intent on his part, from a mistake of rooms or otherwise. In a civil action for assault I doubt that he could justify his possession of the woman by leave and license, though, of course, from absence of mens rea, he would not be guilty of rape.

It may, however, be said that, irrespective of consent, if the taker of a chattel delivered under mistake is protected by a kind of estoppel, he is to be deemed, as against the owner, to be lawfully in possession while such estoppel continues; that is, until the mistake becomes known to him. This suggestion (which has caused me more difficulty than any other point), I think, is founded partly on a confusion of physical possession, or custody, with legal possession, and partly on a misunderstanding arising from the use of the word "estoppel"—an expression which is likely to cause misconception. Until discovery, the relation of the taker to the chattel, which he holds without consciousness of its identity, is, against the owner, custody or detention only. So far as he has acted under the mistake, he is protected. This protection extends to his custody of the chattel and to his conduct in parting with the chattel, if he has done so. The delivery under mutual mistake of identity does not work an estoppel in the sense that the

property must be taken to pass. But the taker is excused in respect of everything attributable to the mistake for which the owner is responsible. While the chattel remains in the taker's hands, he is under a duty to give it up on demand. His detention of the chattel till discovery is lawful; but it is not necessary for his protection that such physical detention should be enlarged into possession, though, if he had parted with the chattel in ignorance, he would be protected even as to the property, notwithstanding that, by reason of the nonexistence of contract, the property had not passed to him. It appears to me that the lawfulness of the detention while the mistake as to identity continues does not draw with it as a consequence that upon discovery the taker can lawfully turn detention into possession and appropriate the chattel. The protection given to mistake does not extend to fraud. There are many cases in which a taker would be under no responsibility or duty to the owner where willful misappropriation on discovery would seem to be theft. * * *

Legal principle and weight of authority, I think, and common sense and reason, I believe—if I may be excused for introducing such matters into the discussion of a common-law offense—point in favor of conviction. Following their guidance, I must decide that Hehir, who is morally a rogue, is legally a felon according to the law of this kingdom. * * *

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3. The Asportation

REGINA v. SIMPSON.

(Court for Crown Cases Reserved, 1854. 1 Dears. 421.)

The following case was reserved for the opinion of the Court of Criminal Appeal by W. H. Bodkin, Esq., acting as assistant judge of the Middlesex Sessions.

William Simpson was tried before me at the Sessions of the Peace for the county of Middlesex, in July, 1854, upon an indictment which charged him with having stolen from the person of Michael Mapper a gold watch and chain, his property. The watch was carried by the prosecutor in the pocket of his waistcoat, and the chain, which was at one end attached to the watch, was at the other end passed through the buttonhole of his waistcoat, where it was kept by a watch key, turned so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the buttonhole; but his hand was

seized by the prosecutor's wife, and it then appeared that, although the chain and watch key had been drawn out of the buttonhole, the point of the key had caught upon another button, and was thereby suspended. It was contended for the prisoner that he was guilty of an attempt only; but I thought that, as the chain had been removed from the buttonhole, the felony was complete, notwithstanding its subsequent detention by its contact with the other button. The jury found the prisoner guilty of the felony; and, a former conviction having been proved, he was sentenced to penal servitude for four years. The execution of the sentence was respited, and the prisoner was committed to the House of Correction, Coldbath Fields, where he now is. I have to pray the judgment of this honorable court whether the facts above stated justify the conviction in point of law.

This case was argued on the 11th of November, 1854, before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., MARTIN, B., and CROWDER, J.

Payne appeared for the crown, and Parry for the prisoner.

Parry, for the prisoner. The conviction was wrong. There may have been a simple larceny, but the asportation was not sufficient to warrant a conviction for stealing from the person. The watch chain, though drawn out of the buttonhole, caught on the button, and the property never was entirely severed from the prosecutor's person.

ALDERSON, B. Whilst it was between the button and the buttonhole, where was it?

Parry. It was about the person of the prosecutor. The watch always remained about his person, and its ultimate condition was that it was suspended from the button. It never was finally and entirely removed from the person of the prosecutor. In Rex v. Wilkinson, 1 Hale, P. C. 508, where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, for the prosecutor had still, in law, the possession of the purse, and licet cepit non asportavit.

COLERIDGE, J. In that case there never was a severance, here there was, and the case expressly speaks of the "subsequent detention" of the chain.

Parry. It is not necessary for me to go so far as that case, because it may be conceded that in this case there was a sufficient asportation to support a charge of simple larceny.

ALDERSON, B. The nearest case to the present one seems to be Rex v. Thompson, 1 Moo. 78.

Parry. In that case a pocketbook was drawn by the prisoner out of the owner's inside coat pocket, and lifted one inch above the top of the pocket, and then, the hand of the thief being caught, it fell

back into the pocket, and, though all the judges held it larceny, they were divided whether it was a stealing from the person, as the pocketbook remained about the person of the owner; and the majority of the judges held that it was not.

ALDERSON, B. How do you distinguish this case from Rex v. Lapier, 1 Leach, C. C. 60, in which the earring was torn from a lady's ear and fell upon her curl?

Parry. There the forcing it from her ear was a severance from her person, but I contend that in this case there was no actual severance. There is a case of Rex v. Farrell, 1 Leach, C. C. 362, where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could remove it from the spot where it lay; and the judges were of opinion that the offense of robbery was not completed. All the cases show the wide distinction between a simple larceny and a stealing from the person. The distinction is one which ought to be considered strictly in favor of a prisoner, and, although this case may be on the very confines of a severance, I contend that no actual severance ever took place.

Payne, for the crown, was not called upon.

JERVIS, C. J. We all are of opinion that the conviction was right. This case is in no respect like that mentioned by Lord Hale, where the prisoner took the purse attached by its strings to the keys, which entangled in the pocket of the prosecutor. In that case there was at no moment the slightest severance from the person; but this is precisely similar to Lapier's Case, in which the jewel was torn from the ear of the prosecutrix and dropped amongst her curls. The ear in Lapier's Case is like the buttonhole in this, and the curl is like the button below. The watch was no doubt temporarily, though but for one moment, in the possession of the prisoner. In Thompson's Case there seems to have been some confusion in the use of the expression "about the person." The words of the act are "from the person," and, with submission to the majority of the judges who held the asportation in that case not to be sufficient, I think the minority were right. The judges in that case may have thought that the outer coat which covered the pocket formed a protection to the pocketbook; but we must not fritter away the law by refining upon nice distinctions in a way to prevent our decisions from being consistent with common sense.

ALDERSON, B. To constitute the offense there must be a removal of the property from the person; but a hair's breadth will do.

The other learned judges concurred.

Conviction confirmed.

4. The Intent

PHILLIPS AND STRONG'S CASE.

(Gloucester Assizes, 1801. 2 East, P. C. 662.)

Phillips and Strong were indicted for stealing a mare and gelding of John Goulter. It appeared in evidence that the prisoners had gone to the stables of Goulter, who kept an inn at a place called Petty France, in the night of the 26th of February last, opened them, and taken out the horse and mare, the subject of the indictment, and rode on them to Lechlade, about 32 or 33 miles off, where they carried them to different inns, and left them in care of the hostlers, directing them to clean and feed them, and saying that they should return in three hours. In the course of the same day the prisoners were taken at a distance of 14 miles from Lechlade, walking toward Farringdon, in Berkshire, in a direction from Lechlade. The jury, being directed to consider whether the prisoners, when they took the horse and mare, intended to make any further use of them than to ride them, for the purpose of assisting them in their journey towards the place where they were going, and then to leave them, to be recovered by the owner or not, as it might turn out, and whether they intended to return to Lechlade and make any further use of them, found the prisoners guilty, but added they were of opinion that the prisoners meant merely to ride them to Lechlade and to leave them there, and that they had no intention to return for them, or to make any further use of them. Upon this finding, at a conference first in Easter, and afterwards in Trinity Term, 1801, the judges (dissentiente Grose, J., et dubitante Lord Alvanly) held it to be only a trespass, and no felony, for there was no intention in the prisoners to change the property or make it their own, but only to use it for a special purpose—i. e., to save their labor in traveling. The judge who dissented thought the case differed from those first above mentioned, because here there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the rest agreed that it was a question for the jury, and that, if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned.

REGINA v. GODFREY.

(Worcester Assizes, 1838. 8 Car. & P. 563.)

Larceny. The indictment charged the prisoner with having stolen six sheets of paper, of the value of threepence, and a paper parcel containing two letters, of the value of threepence, of the goods and chattels of William Brinton.

It was opened by W. J. Alexander, for the prosecution, that Mr. Brinton was a solicitor at Kidderminster, and that the prisoner, Mr. Godfrey, was an innkeeper and stagecoach proprietor at that place, and that on Saturday, the 29th of July, 1837, Mr. Brinton being at Brierley Hill, engaged in the south Staffordshire election, he had occasion to send two letters to Kidderminster; these letters being inclosed in a parcel addressed, "Mrs. W. Brinton, Kidderminster. Immediate." The parcel was sent by a coach of which the prisoner was the proprietor. However, on Mr. Brinton's arriving at home on the next day, he discovered that the parcel had not arrived; and on a note being sent to Mr. Godfrey respecting it he returned a written answer, stating that no parcel had arrived directed to W. Brinton, Esq., and in answer to another note he replied that no parcel had arrived for Mr. Brinton. It would, however, be proved that the parcel did arrive, and that Mr. Godfrey himself received and opened it, and, finding it to contain letters, he broke the seals and read them, and then disposed of them in such manner as he thought proper.

Lord ABINGER, C. B. The facts you have opened are rather a trespass than a felony. Opening a letter from idle curiosity would not be felony.

W. J. Alexander. I should submit that, where the act was done with intent to injure another, that would be sufficient.

Lord ABINGER, C. B. The term "lucri causa" infers that it should be to gain some advantage to the party committing the offense. A malicious injury to the property of another is not enough.

W. J. Alexander. In Cabbage's Case it was held that a taking with intent to destroy is a stealing, if it be done to effect an object of supposed advantage to the party committing the offense, or to a third person. There a person took a horse, and backed it into a coal pit and killed it, his object being that the horse might not contribute to furnish evidence against another person, who was charged with stealing it; and that was held to be larceny, six judges against five holding it not to be essential that the taking should be lucri causa, but thinking that a taking fraudulenter, with intent wholly to deprive the owner of the property, was sufficient.

Lord ABINGER, C. B. I cannot accede to that. If a person, from idle, impertinent curiosity, either personal or political, opens another

person's letter, that it is not felony. Mr. Alexander has opened an action for not safely delivering a parcel, in which a jury might give considerable damages. I cannot see any excuse for the conduct of the defendant, if it was as stated. Still, assuming that statement to be correct, it is no felony. It was evidently done to gratify some idle curiosity, or, perhaps, to prevent the letters from arriving. It is a trespass and a breach of contract, but no felony.

His Lordship directed an acquittal.

Verdict—Not guilty.

COMMONWEALTH v. WHITE.

(Supreme Judicial Court of Massachusetts, 1853. 65 Mass. [11 Cush.] 483.)

Indictment for larceny from a stable, of a horse, wagon, and harness, alleged to have been committed in the county of Bristol. The stable was situated in Easton, in that county, and the property belonged to John McDonald. At the trial in the court of common pleas, before Wells, C. J., the evidence tended to prove that said property was in the stable of the owner, who was absent. The said James White represented to Josiah White, Jr., the other defendant, that he had hired the horse and wagon of the owner, and invited him to go to North Bridgewater. They harnessed the horse about 5 o'clock p. m. and started, and met the owner. He called to them to stop, but they passed on without heeding him. They went to North Bridgewater, and stayed there till evening, when they started on their way back. The horse becoming disabled by a fall, they unharnessed him, turned him loose, and took another horse from a pasture near the road, and harnessed him into the wagon, and proceeded into Easton on the road towards the stable of the owner. While riding along in the town of Easton, James White proposed to Josiah to go to Brighton, in the county of Middlesex. Josiah consented, and they, while in the town of Easton, turned from the road leading to the stable of McDonald and drove to Brighton. And there Josiah, under the instruction and direction of James, put the property into the hands of an auctioneer, stating that his name was Johnson, and that the horse belonged to his father, who had given him leave to sell him. The auctioneer sold the same, but, something happening to excite his suspicions, he refused to pay over the money. McDonald testified that he did not let the horse, wagon, and harness, or either of them, to James White, nor had he ever let to him any horse, wagon, or harness, but that he had sometimes, but not on this occasion, let to Josiah White, Sr., the wagon and harness, but never that horse; that he did not use any force to stop defendants, when he met them, because it would have been very inconvenient for him to have got off from

his load; and that he expected they would return the horse and wagon.

The counsel for the defendant contended: (1) That if the property was let to James White and Josiah White, Jr., there was no larceny. (2) That if the defendant took the property without leave, although the taking was a trespass, but if he intended, when he took it, to return it, there was no larceny, although, while on the way, he should determine to appropriate the property, and should proceed to do with it as appeared from the testimony. (3) That there was no evidence of such a conversion of the property as would amount to the crime of larceny, if the property was taken without leave, but with the intention at the time of returning it.

But the court instructed the jury that if the taking was a trespass, and if the trespasser, at the time of taking, intended to appropriate the property to his own use, the taking would be a larceny of the entire property. If the taking was a trespass, but the defendant intended at the time of taking to return the property, and this intention continued until after the shifting of the horses, there was no larceny of the horse. But if afterwards, and before proposing to go to Brighton, the defendant determined to take the property to Brighton and there dispose of it as his own, and he did in pursuance of that determination do that which was stated in the testimony, this would amount to larceny of the wagon and harness.

The jury found the defendant guilty of simple larceny of the wagon and harness, and not guilty of the residue of the charge in the indictment, and to these instructions the defendant excepted.

MERRICK, J. There appears to be no legal objection to the conviction of the defendant. The questions of fact which arose upon the trial were submitted to the jury, under suitable and accurate instructions in matters of law. The wrongful taking of goods by a party with an intent to assume them as his own, or to convert them to his own use, is a trespass merely. And in many cases the subsequent fraudulent appropriation and conversion of goods, the possession of which has been rightfully obtained, does not constitute a felony. Rosc. Crim. Ev. 472, 478; Archb. Crim. Pl. 186. But if a person by committing a trespass has tortiously and unlawfully acquired possession of personal property belonging to another, and afterwards conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he thereby commits and is guilty of the crime of larceny. 1 Hale, P. C. 507; 2 East, P. C. 662; Regina v. Riley, 1 Dears. C. C. 149. This is the effect and substance of the explanation and statement of the law made by the presiding judge upon the trial. While the defendant was on his way to North Bridgewater, and also during the time of his return, until he fraudulently determined to appropriate and convert the horse

to his own use, and until he did some act in execution of that purpose, he was only a trespasser; but he made himself a thief as soon as he drove or led away the horse, or made any disposition of him with such a felonious intent. This, indeed, is not strenuously denied by his counsel, who relies, in the defense, much more upon the objection that no larceny was committed before the arrival of the defendant at Brighton in the county of Middlesex. But it is clear that the crime had been fully committed at an earlier period. The jury must have found, under the direction of the court, that the defendant formed the determination to take the property to Brighton and there dispose of it as his own before "the horses were shifted," and that he drove on in execution of that design until the horse became "disabled by a fall." Here, then, while the defendant was still in the county of Bristol, are developed the existence of all the elements of the crime of larceny—the unlawful taking, the felonious intent, and the fraudulent conversion of the property to his own use. Upon such proof a conviction was inevitable, and the verdict against the defendant must therefore be affirmed.

Exceptions overruled.

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5. Compound Larceny

REX v. OWEN.

(Court for Crown Cases Reserved, 1792. 2 Leach, C. C. [4th Ed.] 572.)

Edward Owen was indicted for stealing 105 guineas, the property of James Foreman, in the dwelling house of Patrick Brady. Brady kept a public house in Holborn, into which Foreman was seduced by the prisoner, under pretense of dividing the value of a cross which the prisoner picked up and pretended to have found in the street, and then the prisoner obtained the 105 guineas from the prosecutor, under exactly the same circumstances as have been repeatedly given in evidence in the ring dropping cases.[1]

The jury found the prisoner guilty; but the judgment was respited, and the case reserved for the opinion of the twelve judges, on a question whether, as this was a taking from the person of Foreman, though in the dwelling house of Brady, the prisoner was ousted of his clergy under St. 12 Anne, c. 7.

[1] The statement of facts is reprinted from 2 East, P. C. 645.

Mr. Justice ASHURST, in February Session, 1793, said that the judges were of opinion that the prisoner was not, under the circumstances of this case, deprived of his clergy by St. 12 Anne, c. 7, and that this opinion was founded on the authority of the case of Rex v. Campbell, in January Session, 1792; for that to bring a case within this statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, money, kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house.

II. Embezzlement[8]

REGINA v. ASTON.

(Warwick Assizes, 1847. 2 Car. & K. 413.)

Embezzlement. The prisoner was indicted for embezzling the sum of 6s., received by him as the servant of John and Joseph Fulford.

The prosecutors were brewers at Birmingham, and the prisoner was their drayman, and was sent out daily with porter for his masters' customers, and also with a surplus quantity, which he had authority to sell at a certain fixed price only, viz., at 9s. 6d. a dozen. The prisoner sold a dozen of this porter at 6s. to Jeremiah Webb, in the month of July, 1846, but did not receive the money at the time of the sale, but said he should call for it afterwards. One of the Messrs. Fulford heard of the transaction from the customer, and told him to let the prisoner have the money, but this was unknown to the prisoner; and on the 20th of August following, the prisoner having called for the money, the customer, Webb, paid it to him, and the prisoner having denied the receipt of it to the prosecutors, he was apprehended.

Hayes, for the prisoner, objected that the money was not received by virtue of the prisoner's employment; the prosecutor having proved that the prisoner had no authority to sell at the price charged, and cited the case of Rex v. Snowley, 4 Car. & P. 390.

PATTESON, J., after conferring with PARKE, B., said that he had great doubts as to the authority of the case cited, and that Baron Parke and himself also considered that, as the master in the present case had authorized the customer to make payment to the pris-

[8] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 99, 100.

oner, the master was bound by that payment, and could not demand more of the customer, and that the evidence was sufficient to support the indictment.

Verdict—Guilty.

REGINA v. CULLUM.

(Court for Crown Cases Reserved, 1873. L. R. 2 C. C. 28.)

Case stated by the chairman of the West Kent Sessions.

The prisoner was indicted, as servant to George Smeed, for stealing £2, the property of his master.

The prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo, and from such persons, as his master should direct. The prisoner had no authority to select a return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled, by way of remuneration for his services, to half the earnings of the barge, after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston. Going from London to Murston, he would pass Caxton. Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye, at Caxton, and received from Mr. Pye's men £4 as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the £4 said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December the prisoner returned home to Sittingbourne, and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the £4 received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty, as servant to Mr. Smeed, of embezzling £2.

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement.

BOVILL, C. J. In the former act relating to this offense were the words "by virtue of his employment." The phrase led to some difficulty; for example, such as arose in Reg. v. Snowley, 4 C. & P. 390, and Reg. v. Harris, Dears. Cr. C. 344. Therefore in the present statute those words were left out; and section 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant, the "chattel, money, or valuable security * * * shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's order, used the barge for his (the servant's), own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received "for," or "in the name of," or "on account of" his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.[9]

III. Cheating at Common Law[10]

STATE v. MIDDLETON.

(Court of Appeals of South Carolina, 1838. Dud. 275.)

O'NEALL, J.,[11] delivered the opinion of the court.

The indictment charges the defendant in three counts, as follows, to wit: (1) That she did overreach. (2) That she did cheat. (3) That she did defraud one Alexander L. Gregg of sundry articles of prop-

[9] Concurring opinions of Bramwell, B., and Blackburn and Archibald, JJ., are omitted.

[10] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 101, 102.

[11] The statement of facts and part of the opinion are omitted.

erty, by passing to him a promissory note on one L. G. Smith and John Foxworth for $10, pretending that it was of that value, and that the makers were in law liable to pay and would pay the same, when she in fact knew that they were not liable to pay and would not pay the same. This is the substance of the charges.

The first inquiry arises, is any offense at common law charged? I think it is very clear there is not. It is a mere civil injury, for which the party injured might have his remedy by action of deceit. It is a mere false representation of a thing to be of value, which the defendant knew to be valueless. There is in this no offense against the public. It is in its consequences and effects confined to the parties to the transaction, and thus at once shows that no prosecution at common law can be sustained. The definition of a cheat at common law, given by Russell, in his second volume (139), the fraudulent obtaining of property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public, seems to give, in general terms, the most proper notion of the offense which I have been able to meet with. It has the support of the case of Rex v. Wheatly, 2 Burr. 1125, in which the defendant was indicted for selling 16 gallons of amber, when it had been represented by him at 18 gallons, and sold accordingly; the defendant well knowing that the true quantity was 16 gallons. It was held that this was no offense, and that the judgment must be arrested. In that case Lord Mansfield stated the rule to be that "the offense that is indictable must be such a one as affects the public—as if a man uses false weights and measures, and sells by them to all or many of his customers, or uses them in the general course of his dealings; so if a man defrauds another under false tokens. For these are deceptions that common care and prudence cannot guard against." * * *

It is therefore now necessary, in this connection, to inquire what is a false token. It is somewhat difficult to define with precision, or rather to describe, a false token in all cases. Taking the preamble of the statute as our guide, we would say it must be something false, and purporting to come from one not the bearer, and having in itself some private mark or sign, calculated to induce the belief that it is real, and thus to cause the person to whom it is delivered to part with his money or goods to the bearer or person delivering it. On looking into 2 Russell, 1384, I find the definition which I have given is substantially that which he approves. This would be enough for this part of the case, for it is manifest that the note set out in the indictment could not be a privy false token, according to the definition or description which has been given. But it may be well here to notice what is meant by a false token at common law; for it will, perhaps, aid us in the view which we may have to take of this case under the act of 1791. It seems to me that it is anything which has the semblance of public authority, as false weights, measures, seals, and marks of produce and

manufactures, false dice, marked cards, and things of a similar kind, false and deceptive, used in unlawful games. 2 Russ. on Crimes, 1368. It is true, in looking into the books, we find many cases of indictment in which fraud is an essential requisite, as in cases of common cheat, forgery, and conspiracy; and some confusion has arisen from such cases being often spoken of under the general head of cheats at common law, and therefore mingled with the offense of cheating or swindling by false tokens. But each of them constitutes an independent and distinct offense. * * *

The motion in arrest of judgment is granted.

IV. Cheating by False Pretenses [12]

REGINA v. ARDLEY.

(Court for Crown Cases Reserved, 1871. L. R. 1 C. C. 301.)

Case stated by the Chairman of Quarter Sessions for the County Palatine of Durham.

Indictment for obtaining £5 and an Albert chain of the value of 7s. 6d. by false pretenses.

The material facts were as follows:

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweler, and stated that he was a draper, and was £5 short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain which he (the prisoner) was then wearing. The prisoner said: "It is 15-carat fine gold, and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The prosecutor bought the chain, relying, as he said, on the prisoner's statement, but also examining the chain, and paid £5 for it, and gave also to the prisoner in part payment a gold Albert chain valued at 7s. 6d. The prisoner's chain was marked "15 ct." on every link, and in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain of a character similar to that sold to the prosecutor; this also being marked "15 ct." on every link. It was proved that "15 ct." was a hallmark used in certain towns in England, and placed on articles made of gold of that quality, and that chains when assayed are generally found to be one grain less than the mark, ex-

[12] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 103, 104.

ceptionally two grains. The chain bought by the prosecutor was assayed, and found to be of a quality a trifle better than 6-carat gold, and of the value in gold of £2. 2s. 9d. It was proved that, had it been 15-carat gold, it would have been worth £5. 10s. Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for £3. 0s. 3d.; but, had it been 15-carat, it would have been sold for £9. There were no drapery goods or anything connected with such trade found on the prisoner; but, when arrested, he had in his possession a license to sell plate, two watches, two white-metal watch guards, and the chain obtained from the prosecutor.

The chairman was asked by the counsel for the prisoner to stop the case, on the authority of Reg. v. Bryan, Dears. & B. C. C. 265, but declined to do so, and left the case to the jury, who found the prisoner guilty, and said they found that the prisoner knew that he was falsely representing the quality of the chain as 15-carat gold. * * *

Bovill, C. J. The question which we have to consider in this case is whether there was evidence to go to the jury on which they could find the prisoner guilty of obtaining money under false pretenses. I think there clearly was evidence, and that it would have been quite impossible for the learned chairman with any propriety to stop the case. There were, in addition to the representations as to the quality of the gold, distinct statements of matters of fact, and there was evidence of the falsehoods of these statements. The prisoner stated that he was a draper, and was £5 short of the money required to make up a bill. But there were no drapery goods, nor anything connected with such trade, found on the prisoner; but, when arrested, he had in his possession a license to sell plate, two watches, two white-metal watch guards, and the chain obtained from the prisoner, and he wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked 15-carat gold on every link. Looking, therefore, at the whole of the evidence, there is sufficient ground on which the finding of the jury may be supported and the conviction sustained.

But the jury have further found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false. And the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is Reg. v. Bryan,

Dears. & B. C. C. 265. The representation in that case was that certain plated spoons were "equal to Elkington's A." Prima facie that representation would seem to be a mere matter of opinion, and the court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C. J., says: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing." Pollock, C. B., says: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different, even in quality, from what it was, the statute would apply." It is plain that these learned judges considered that a specific representation of quality, if known to be false, would be within the statute. Coleridge, J., expressly concurs in the observations of Pollock, C. B. Erle, J., at the close of his judgment, says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion. Still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons." Crompton, J., also considered that the statute applies "when the thing sold is of an entirely different description from what it is represented to be." Willes, J., who dissented from the judgment of the court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to show the quality of the chain, the conviction is good. The case differs from Reg. v. Bryan, Dears. & B. C. C. 265, because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain.

Conviction affirmed.[18]

[18] The concurring opinions of Willes and Byles, JJ., and Channell and Pigott, BB., are omitted.

REGINA v. JONES.

(Court for Crown Cases Reserved, 1897. [1898] 1 Q. B. 119.)

The judgment of the court (Lord RUSSELL of Killowen, C. J., WRIGHT, KENNEDY, DARLING, and CHANNELL, JJ.) was delivered by Lord RUSSELL of Killowen, C. J.[14] This case was reserved for our consideration by the Recorder of Worcester. The defendant was indicted in two counts. In the first he was charged under the larceny act of 1861, with obtaining goods by false pretenses. * * *

The facts were shortly these: The prosecutor kept an eating house, and on June 20th the defendant went in and asked for some soup. He was told that there was none ready, and thereupon asked for some cold beef. He was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal. While there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell, and asked what there was to pay, and, upon being told four shillings, said that he had no means of paying, that he had no money, and had (as was the fact) only a halfpenny upon him. Such was the state of the facts. All that the defendant did was to go into an eating house, order food and refreshment, and eat, but not pay for it. No question was put to him, and no inquiry was made of him, by the prosecutor as to his means; nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretenses. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretense by conduct; for example, the case of Rex v. Barnard, 7 C. & P. 784, where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the University. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a check on a bank where he either has no account or has not sufficient means to meet the check, and must have known that he had not sufficient means. In the present case the defendant did nothing beyond what I have already stated. No inquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on the first count. There was no evidence that the defendant had obtained these articles by false pretenses. * * *

[14] The statement of facts and part of the opinion are omitted.

REGINA v. GARDNER.

(Court for Crown Cases Reserved, 1856. Dears. & B. 40.)

The evidence on the part of the prosecution, as far as is material for the purpose of this case, was that on the 13th day of November last the defendant, wearing the dress of a naval officer, engaged a lodging of Ellen Henrietta Brunsden (the prosecutrix) at the rate of 10 shillings per week; that on the 17th day of November the defendant expressed himself to prosecutrix as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of the Duke of Wellington, and his name was De Lancy; that the defendant continued a lodger till the 25th of November, and then expressed a wish to become a boarder, and an arrangement was accordingly entered into that he should become a boarder at a guinea a week; that the prosecutrix supplied the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese, and beer, for the six days following, but the defendant did not pay her anything for the lodging or board. * * *

Ribton, for the prisoner. The conviction was wrong. It is important to observe the dates. When the false statement was made, neither money, chattel, nor valuable security was obtained by it; and obtaining lodging by a false pretense is not an offense within the statute. On the 25th November, when the contract to board was obtained, no false pretense was made.[15]

COLERIDGE, J. Would it not be a question for the jury whether there was not a continuing false pretense?

Ribton. To obtain a contract by a false pretense is not within the act. It is not obtaining goods. Here, if anything besides the lodging was obtained by the false pretense, it was not food, but simply a new contract to supply board, and that would not be within the statute. The board might have been supplied, not in consequence of the false pretense made when the contract for the lodging was obtained, but in consequence of the prisoner's manners and conduct after that time, and whilst he was a lodger.

COLERIDGE, J. Yes; but your point is that there was no evidence to go to the jury, even supposing the interval between the false pretense and the contract had only been an hour.

Ribton. It is quite clear that to obtain lodging alone would not be within the statute. Here the contract is for board and lodging united, and it is doubtful whether in any case obtaining board and lodging would be within the statute. It would always be difficult to separate the two, so as to show that the articles of food were obtained by means of the false pretense; but here, at all events, the evidence fails alto-

[15] The statement of facts is abridged.

gether to connect the obtaining of the food with the false pretense.

Horn, for the Crown. It is indisputable law that the intervention of a contract is no answer to a charge of obtaining goods by false pretenses, if the contract be part of the fraud. Here the prisoner has obtained goods by means of his false pretenses, and the fact that the contract was to pay for the board and lodging together does not make it less an obtaining of goods. * * *

JERVIS, C. J. The difficulty in the case of contracts is, where the party deceived gets not the consideration which he expects, but something like it.

Horn. In this case the false pretense is clearly proved. It was a continuing pretense, and the prosecutrix, acting upon it, was eventually induced to supply the prisoner with board, as well as lodging. It is objected that lodging is not within the statute. Land is not within the statute; but suppose, by a false pretense, I get an estate and a purse of gold? The articles of food which the prisoner obtained were chattels within the meaning of the statute; and the fact that the prisoner gained lodging as well as board cannot make any difference. The question whether the food was obtained by the false pretense was for the jury, and they have found that it was.

Ribton replied.

JERVIS, C. J. In this case, which was argued before us on Saturday last, the court took time to consider, principally with a view of first taking into consideration the cases of Regina v. Roebuck and Regina v. Burgon, which have just been disposed of. It was an indictment for obtaining goods under false pretenses, the circumstances being that the prisoner represented himself to be the paymaster of the Duke of Wellington, of the name of De Lancy, upon which he made with the prosecutrix a contract for board and lodging at the rate of one guinea a week, and he was lodged and fed as the result of the contract, in consequence of the engagement so entered into upon that which was found to be a false pretense; and the question which was submitted to us was whether it was a false pretense within the statute, or, rather, whether the conviction was right? That we have considered, and on consideration we are of opinion that the conviction was not right, because we think that the supply of articles, as it was said, upon the contract made by reason of the false pretense, was too remotely the result of the false pretense in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretenses. We therefore think the conviction should be reversed.

Conviction quashed.

V. Robbery [16]

HUGHES' AND WELLINGS' CASE.

(Lancaster Assizes, 1825. 1 Lew. 301.)

Prisoners were indicted for robbery. It appeared in evidence that they, together with others, their companions, hung around the prosecutor's person in the streets of Manchester, and rifled him of his watch and money. It did not appear, however, that any force was used, or any menace; but they so surrounded him as to render all attempt at resistance hazardous, if not vain.

Per BAYLEY, J. In order to constitute robbery, there must be either force or menaces. If several persons so surround another as to take away the power of resistance, this is force.

Prisoners were convicted.

HILL v. STATE.

(Supreme Court of Nebraska, 1894. 42 Neb. 503, 60 N. W. 916.)

POST, J.[17] * * * Exception was taken also to the following instruction: * * * "You are therefore instructed in this case, if you believe from the evidence beyond any reasonable doubt that, at the time of the alleged killing of Mattes Akeson, the defendant, Harry Hill, with John Benwell, had entered his dwelling house, armed with a deadly weapon or weapons, for the purpose of intimidating the deceased for the furtherance of their purpose to steal, take, and carry away by force and violence the money or any article of personal property of the deceased's dwelling house, and that in the prosecution of that purpose and design the defendants, or either of them, shot the deceased, and thereby caused his death, * * * that such killing would be murder in the first degree."

There appears to have been an error or omission in the transcribing of the above instruction, wherein the court is made to say that the accused might be convicted if he feloniously killed the deceased while engaged with his codefendant in attempting forcibly to take, steal, or carry away "any article of personal property of the deceased's dwelling house." But the objection to the instruction is upon other

[16] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 105–107.

[17] Part of the opinion is omitted.

grounds, viz., that it authorizes a conviction provided the jury should find that the defendant forcibly entered the house of the deceased for the purpose of committing a larceny. Robbery at common law was defined as larceny committed by violence from the person of one put in fear. 2 Bishop, Criminal Law, 1156. By section 13 of our Criminal Code it is provided that "if any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years." The taking, according to each definition, must be from the person, since the crime of robbery is an offense as well against the person as against property. It is, however, not essential to a conviction for the crime named that the property be taken from the body of the person wronged. It is sufficient if taken from his personal presence or personal protection. 2 Bishop, Criminal Law, 1177, 1178; United States v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385; State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252. In the last-named case, which was under a statute similar to ours, the prisoner was shown to have bound the prosecutrix, and by putting her in fear extorted information respecting the place where her money and other personal property was kept. Leaving her bound, he went to the place designated by her in another room of the same house and took the property named in the indictment. In the opinion the court, by Beck, J., uses this language: "The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it." And in Clements v. State the prisoner, by threats of violence, detained the prosecutor in an outhouse while a confederate entered his dwelling, 15 paces distant, and took therefrom the property described, and the taking was held to be in the presence of the prosecutor, within the meaning of the statute defining robbery. The taking of the property of the deceased from his dwelling under the circumstances indicated by the instruction would have been robbery. It would also have sustained a conviction for larceny. Brown v. State, 33 Neb. 354, 50 N. W. 154. The objection to the instruction is, therefore, without merit. * * *

VI. Receiving Stolen Goods [18]

REGINA v. WILEY.

(Court for Crown Cases Reserved, 1850. 1 Eng. Law & Eq. 567.)

MARTIN, B.[19] * * * It appears that two men stole some fowls, put them into a sack, and brought them into the house of Wiley's father, for the purpose of selling them to Wiley; that they all three went out of the house into the stable, the thieves carrying the sack and Wiley preceding them with a candle; that the stable door was shut; and that the policeman, on opening it, found the sack on the ground and three men standing round it, as if bargaining. Upon this case I am of opinion that Wiley never did receive these articles. I entirely agree that the question arises upon the possession. There was no property in these fowls, or in any of them. The men who stole the fowls had them in their possession, and intended to hold them hostilely to Wiley, and never intended to let him have them, unless some bargain were made between themselves and Wiley for the purchase of them. I think that, in the ordinary acceptation of the word "receive," Wiley could not be said to have received this property, and that, therefore, he ought not to have been convicted.

ERLE, J. I am of opinon that the conviction is right, and on two grounds. The first ground is because Wiley co-operated with the thieves in removing the goods into the stable, which was under Wiley's control, for the purpose of more securely effecting a bargain respecting them. Now, if Wiley had taken part in the actual carrying of the goods, there would have been no doubt, I believe, in the minds of many of my Brothers but that he would have been rightly convicted. But he lighted a candle, and preceded the thieves, while they carried the sack; and I think that in so doing he co-operated with them, so as to render himself liable to be convicted as a receiver. I come to this conclusion on the principle of the law that a person who assists a thief in removing to a place of safety goods which the latter has already removed from the owner's premises cannot be convicted of larceny; but it seems to me that the person who so co-operates is a criminal, and that the law would reach him as a receiver. The other ground on which I think that this conviction may be sustained is that I attach a

[18] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 108, 109.

[19] The statement of facts, parts of the opinions of Martin, B. and Earle and Coleridge, JJ., and the opinions of Talfourd, Williams, Cresswell, Maule, and Patteson, JJ., Platt, Alderson, and Parke, BB., and Campbell, C. J., are omitted.

wider meaning to the word "receive" than has been given to it by some of my Brothers. The rules respecting property which have relation to civil rights seem to me to have no application here. Several statutes have been passed to render an accessory after the fact more open to punishment than he was at common law. I think that the word "receive," with respect to stolen goods, should be construed with reference to the word "harbor," applied to the thief. If a man harbors the stolen goods, knowing them to be stolen, for the purpose of aiding the thief, he is liable under the statute as a receiver. If he is the owner of a stable, and authorizes thieves to deposit stolen property on the premises, he would be liable in like manner; and it seems to me that he is not the less liable because the thieves remain there also. If they bring the property there with his consent, he is, I think, guilty of receiving it. The earlier statutes did not contemplate that there must be any bargain or transfer of the goods to a man to constitute him a receiver. In St. 29 Geo. II. c. 30, it was made an offense to leave the window, door, or shutter of any premises open at night for the purpose of offering a thief a place of deposit for any stolen lead or other metal. * * *

On both these grounds I am of opinion that the conviction is right. * * *

COLERIDGE, J. I also think that the conviction is wrong. * * * In my opinion, "receiving" must import possession, actual or constructive. I cannot find either here. I think, therefore, that the conviction is wrong. It is of great importance that in the administration of the criminal law we should proceed upon broad principles of construction, intelligible to common understandings.

Conviction reversed.

REGINA v. WOODWARD.

(Court of Criminal Appeal, 1862. 9 Cox, C. C. 95.)

Case reserved for the opinion of the Court of Criminal Appeal. At the Quarter Sessions of the Peace for the County of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others, my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labor, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account; but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed. J. W. Awdry.

ERLE, C. J. The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife; but there was nothing in the nature of a complete receipt of the goods until the thief found the husband, and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed. Till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.[20]

WILDE, B. I read the case as showing that the wife received the goods on the part of the prisoner, her husband, and that act of hers was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of Reg. v. Dring and Wife, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J., concurred.

Conviction affirmed.

[20] The concurring opinions of Blackburn and Keating, JJ., are omitted.

VII. Malicious Mischief [21]

COMMONWEALTH v. CRAMER.

(Court of Quarter Sessions of Dauphin County, Pa., 1870. 2 Pears. 441.)

BY THE COURT.[22] The defendant was charged, under the 154th section of the Penal Code (P. L. 1860, p. 419), with having willfully and maliciously maimed, disfigured, and wounded a steer, the property of Jonas C. Brinzer, and, having been convicted at the last sessions, a motion was made for a new trial on account of misdirection in the charge of the court and also in arrest of judgment. There is no ground whatever for arresting the judgment, as the indictment is good on its face. The only question, is was it properly supported by the evidence, and was the jury rightly instructed as to the law of the case?

It was proved on the trial that at the time of the injury the steer was trespassing on the inclosed grounds of the defendant; had repeatedly jumped into his cornfield, and was destroying his corn; that he was very troublesome, addicted to jumping, and what might be called in common parlance "very breachy." The defendant shot him many times with a gun heavily loaded with shot, at one time wrapping up the charge and hitting him so severely that he fell to his knees, but was able to run off and again jump the fence, which was low and not in good order. The steer was neither maimed nor disfigured, but was pretty severely "wounded" by the shots, and greatly fell away in flesh. The court instructed the jury that the evidence did not bring the case within the statute, but, if he was wounded as charged in the indictment, it was a crime at common law, although concluding contra formam statuti. The only question of any difficulty was whether the act must be done out of malice towards the owner or malice and passion against the animal. There was no pretense that there was any malice towards the owner in this case, as the parties were comparative strangers to each other and lived many miles apart. The prosecutor's cattle were pasturing on an adjoining farm to the defendant.

It is a little difficult to ascertain precisely what amounts to malicious mischief by the common law. Blackstone, in his Commentaries (volume 4), says: "The act must be done either out of a spirit of wanton cruelty, or black and diabolical revenge." One reason why we find so little on the subject in the English writers on criminal jurisprudence tending to show what amounted to this crime at common law is that

[21] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 110.

[22] Part of the opinion is omitted.

almost every possible injury to property was punished by statutes, and the indictments have generally, and perhaps always, for the last 200 years, been preferred under some one of the various acts of Parliament. It may be conceded that in England it is settled that the offense must be committed out of malice towards the owner of the injured property, unless, perhaps, in cases of great and wanton cruelty towards domestic animals. Even under their statutes it is held that there must be malice towards the owner. The worst acts of cruelty committed through passion against the animal are not punished criminally. In this state, and perhaps in many others, our laws have been construed differently. When our various acts passed to protect property of any kind speak of malicious and willful injury thereto, we are justifiable in saying that it applies to the forbidden act, whether done out of malice toward the owner, or through a spirit of wanton mischief, especially if accompanied with cruelty. Where malice is thus mentioned, it does not mean hatred or ill will, but imports an evil disposition in general, a heart regardless of social duty. Our Code is full of provisions protecting inanimate objects, as well as animate, and we hold that they are equally protected from wanton mischief, or from injury or destruction out of malice towards the owner. Wharton, our best writer on Criminal Law in this state, says, in volume 2, at page 2002: "Malicious mischief in this country as a common-law offense has received a far more extended interpretation than has been attached to it in England." He defines it to be "any malicious or mischievous injury, either to the rights of another or those of the public in general." In Commonwealth v. Walden, 3 Cush. (Mass.) 558, it is said: "The jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge." In Massachusetts the distinction seems to be taken between injuries done to animate and inanimate objects. In the latter there must be malice towards the owner, whilst in the former wanton cruelty is criminally punishable. It was held in that state to be indictable to poison cattle. Commonwealth v. Leach, 1 Mass. 59.

The subject has undergone considerable examination in the state of New York. In People v. Smith, 5 Cow. (N. Y.) 258, "it is held to be indictable to maliciously, wickedly, and willfully kill a cow." The court speaks of the act being one of wanton cruelty, and that it cannot be expected that a mind so depraved will be restrained by a mere liability to pay damages. The perpetrator may be insolvent, and thus gratify his malice with impunity, if there is no redress other than by civil action. The object is to protect the citizen in his right by restraining and punishing the wrongdoer. Such acts discover a degree of moral turpitude dangerous to society, and for its security ought to be punishable criminally. It is an evil example of the most pernicious tendency, inasmuch as the act is an outrage upon the principles and feelings of humanity.

In Loomis v. Edgerton, 19 Wend. (N. Y.) 419, it was held to be indictable to willfully, wickedly, and secretly break up a cutter, and People v. Smith, 5 Cow. (N. Y.) 258, is cited with approbation. The judge, after stating that in many courts it had been held that such offenses were not indictable, says he "is happy to find that the weight of authority is the other way." "To say that it was not so would be a sad exception to the general wisdom of the common law." At an after time the courts of that state decided in Kilpatrick v. People, 5 Denio (N. Y.) 277, that it was not indictable at common law to maliciously break the windows of another's dwelling. If done secretly, it might be otherwise. At the same time the court considers that a criminal prosecution might be sustained for maliciously killing or wounding domestic animals, as that shows depravity of mind and cruelty of disposition, and the cases in 1 Dall. (Pa.) 335, 1 L. Ed. 163, Respublica v. Teischer, and 5 Bin. (Pa.) 277, Commonwealth v. Taylor, are spoken of with approbation, as also that already cited from 5 Cow.

In State v. Briggs, 1 Aikens (Vt.) 226, an indictment was sustained for cutting, maiming, and destroying colts. The judge says: "When the most wanton cruelty to the beast is the grievance, we may pass by the civil injury and treat the deed as a misdemeanor at common law. With force and arms to injure the property of another is a civil injury, for which the owner of the property may have his action of trespass. But the wounding and torturing a living animal, not only with force and arms, but with all the malicious and wicked motives and intentions set forth in this indictment, is a misdemeanor to be prosecuted by the judges." This case appears afterwards to have been disregarded and overruled in that state, but in our opinion is good law and sound morals.

In Pennsylvania we have perhaps gone further than in any other state in punishing malicious mischief. As early as 1788, in Teischer's Case, 1 Dall. 335, 1 L. Ed. 163, it was held indictable to maliciously, willfully, and wickedly kill a horse, and McKean, C. J., says whatever amounts to a public wrong may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offenses of a similar description have heretofore been indicted. Breaking windows by throwing stones at them, embezzling public money, so for maliciously killing a dog, for writing threatening letters to obtain money, United States v. Ravara, 2 Dall. (Pa.) 297, Fed. Cas. No. 16,122, 1 L. Ed. 388; girdling a tree growing on public ground, Commonwealth v. Eckert, 2 Browne (Pa.) 249; so to enter the house of another, make a great noise, and disturb and alarm the family (5 Bin.); to be guilty of wanton cruelty to animals in general, United States v. Logan, 2 Cranch, C. C. 259, Fed. Cas. No. 15,623; to put cowitch on a towel to injure a person about to use it, People v. Blake, 1 Wheeler, Cr. Cas. (N. Y.) 490; to cut off the hair from the mane or tail of a horse, Boyd v. State,

2 Humph. (Tenn.) 39; to discharge a gun with intent to disturb a sick person, Commonwealth v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347; so to destroy a line tree or other landmark, or to set fire to a number of barrels of tar belonging to another; so to cast the carcass of a dead animal into a well in daily use, State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646. Most of these cases are cited in 2 Wharton's Cr. Law, p. 2003. * * *

In the case before us the owner of the cornfield could have had ample redress for the injury done by the steer, had he proceeded under the law relating to estrays or by an action against the owner. Instead of pursuing a legal remedy, he resorted to acts of barbarity which are themselves evidence of malice. Although we may, in pronouncing sentence, take into consideration the provocation to anger by the trespasses of the animal, yet we cannot avoid imposing some punishment on the defendant for his violation of the criminal law. * * *

VIII. Forgery [22]

1. The Making of the Instrument

COMMONWEALTH v. BALDWIN.

(Supreme Judicial Court of Massachusetts, 1858. 11 Gray, 197, 71 Am. Dec. 703.)

THOMAS, J.[24] This is an indictment for the forgery of a promissory note. The indictment alleges that the defendant, at Worcester, in this county, "feloniously did falsely make, forge, and counterfeit a certain false, forged, and counterfeit promissory note, which false, forged, and counterfeit promissory note is of the following tenor, that is to say:

" '$457.88. Worcester, Aug. 21, 1856.

" 'Four months after date we promise to pay to the order of Russell Phelps four hundred fifty-seven dollars $^{88}/_{100}$, payable at Exchange Bank, Boston, value received. Schouler, Baldwin & Co.'

with intent thereby then and there to injure and defraud said Russell Phelps."

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was

[22] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 111–113.

[24] Part of the opinion is omitted.

executed and delivered by the defendant to him at the Bay State House, in Worcester, on the 21st of August, 1856, for a note of equal amount, which he held, signed by the defendant in his individual name, and which was overdue, and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co. the defendant said, "Henry W. Baldwin and William Schouler, of Columbus." He further said that no person was represented by the words "& Co." It appeared in evidence that the note signed Schouler, Baldwin & Co. was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant, or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult, perhaps, by a single definition of the crime of forgery, to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of the prisoner, if it purports to be, and is desired to be received as, the instrument of a third person having the same name.

As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in 3 Inst. 169, where A. made a feoffment to B. of certain land, and afterwards made a feoffment to C. of the same land, with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name, making one's own act to appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the

livery of seisin—the entry of the feoffer upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed—it is not easy to see how the date could be material.

The case of Mead v. Young, 4 T. R. 28, is cited as another exception to the rule. A bill of exchange payable to A. came into the hands of a person not the payee, but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorsement was a forgery, and that no title to the note could be derived through a forgery. In this case of Mead v. Young, the party assumed to use the name and power of the payee. The indorsement purported to be used was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such, and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretense, a pretense that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk. c. 70, § 5.

If the defendant had written upon the note, "William Schouler, by his agent, Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co.; or, if the partnership had in fact before existed, but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of Regina v. White, 1 Denison, 208, the prisoner indorsed a bill of exchange, "Per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery. * * *

The result is that the exceptions must be sustained and a new trial ordered in the common pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause.

Exceptions sustained.

COMMONWEALTH v. SANKEY.

(Supreme Court of Pennsylvania, 1853. 22 Pa. 390, 60 Am. Dec. 91.)

BLACK, C. J.[25] The defendant wrote a note payable to himself, for $141, and got an illiterate man to sign it, by falsely and fraudulently pretending that it was for $41 only. On a special verdict finding these facts, the court gave judgment in favor of the accused.

The act was a forgery according to all the text-writers on criminal law, from Coke to Wharton. But their doctrine is not sustained by the ancient English cases, and is opposed by the modern ones. Only three American decisions were cited on the argument; and we take it for granted that there are no others on the point. Two of these, Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206, Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441, are wholly with the defendant, and the other, State v. Shurtliff, 18 Me. 371, supports the argument of the commonwealth's counsel. The weight of the judicial authorities is in favor of the opinion that this is no forgery. We think that the arguments drawn from principle, and the reason of the thing, preponderate on the same side. It must be admitted that, in morals, such an imposture as this stands no better than the making of a false paper. But even a knave must not be punished for one offense because he has been guilty of another. Forgery is the fraudulent making or altering of a writing to the prejudice of another's right. The defendant was guilty of the fraud, but not of the making. The paper was made by the other person himself, in prejudice of his own right. To complete the offense, according to the definition it requires a fraudulent intent and a making both. The latter is innocent without the former, and the former, if carried into effect without the latter, is merely a cheat. If every trick, or false pretense, or fraudulent act by which a person is induced to put his name to a paper which he would not otherwise have signed, is to be called a forgery, where shall we stop, and what shall be the rule? Is it forgery to take a note for a debt known not to be due; or to procure a deed for valuable land by fraudulently representing to the ignorant owner that it is worthless; or to get a legacy inserted in a will by imposing on a weak man in his illness? All these would be frauds—frauds per-

[25] The statement of facts is omitted.

petrated for the purpose of getting papers signed—as much as that which was committed in this case. But no one thinks they are forgeries.

For these reasons, and the reasons given in the court below, which we fully adopt, the judgment is to be affirmed.

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2. Character of the Instrument

REGINA v. SMITH.

(Court of Criminal Appeal, 1858. 8 Cox, C. C. 32.)

Case reserved and stated by the Recorder of London:

John Smith was tried before me at the Central Criminal Court, upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor, George Borwick, was in the habit of selling certain powders, some called "Borwick's baking powders," and others "Borwick's egg powders."

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick, but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavored to sell baking powders, but had them returned to him because they were not Borwick's powders.

Subsequently he went to a printer, and, representing his name to be Borwick, desired him to print 10,000 labels as nearly as possible like those used by Borwick, except that the name of Borwick was to be omitted in the baking powders.

The labels were printed according to his order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offense charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal, and I left it to the jury to find whether the labels so far resembled those used by Borwick as to deceive persons of ordinary observation, and to make them believe them to be Borwick's

labels, and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them, directing them in that case to find the prisoner guilty.

The jury found him guilty. * * *

McIntyre, for the prisoner. This is not a forgery, either at common law or within the statute. The gist of the offense was the passing off for genuine baking powder that which was not so; in fact, something that was not so good. This was nothing more than a puff. In Reg. v. Closs, 27 L. J. 54, M. C., it was held that a person could not be indicted for forging or uttering the forged name of a painter, by falsely putting it on a spurious picture to pass it off as the genuine painting of the artist. This was no more than a printed label, and only differs from Reg. v. Closs in that there the name was painted on the picture. In the case of Burgess' sauce labels the Court of Chancery refused to restrain the son from using labels with the father's name upon them. [POLLOCK, C. B. Suppose a man opened a shop and painted it so as exactly to resemble his neighbor's; would that be forgery?] No. The affixing this label to the powder amounts to no more than saying: "This is Borwick's powder." If the prisoner had had a license, he would have had a right to use the labels.

Huddleston (Poland with him), for the prosecution. The jury have found that the labels were made and uttered by the prisoner with intent to defraud. The definition of forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right." 2 Russ. on Crimes, 318; 4 Black. Com. 247; Stark. Crim. Law, 468; 2 East, P. C. p. 965, c. 19, § 49. And the finding of the jury brings this case within that definition. [CHANNELL, B. What was a document at common law which could be the subject of a forgery? POLLOCK, C. B. Was a book of which another man made copies?] It is submitted that it was. Com. Dig. "Forgery." Letters may be the subject of forgery. Chit. Crim. Law, 1022. So a diploma of the College of Surgeons may be. Reg. v. Hodgson, 7 Cox, C. C. 122. So also the certificate of the examiners of the Trinity House. Reg. v. Toshack, 1 Den. C. C. 492. So a letter of the character of a servant may be. Reg. v. Sharman, 1 Dears. C. C. 285. Then this label is a certificate as to the character of an article. Reg. v. Closs, R. v. Colicott, R. & R. 201, and Stark. Crim. Law, 479, were also cited.

BRAMWELL, B.[26] I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the

[26] The statement of facts is abridged and the concurring opinions of Pollock, C. B., and Willes and Byles, JJ., are omitted.

other. In the present case one of these documents is as good as the other, the one asserts what the other does, the one is as true as the other, but the one is improperly used. But the question now is whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretenses, but I think he cannot be convicted of forgery.

3. The Intent

REGINA v. HODGSON.

(Court for Crown Cases Reserved, 1856. 36 Eng. Law & Eq. 626.)

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Bramwell, B., at the Staffordshire Spring Assizes, 1856:

Henry Hodgson was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form.

The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and if satisfied therewith admits them, and issues a document, called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own, changed the date, and made other alterations to make it appear to be a document issued by the college to him. He hung it up in his sitting room, and, on being asked by two other medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion.

When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it if the person inquiring (the clerk of the guardians, who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce or show it.

The prisoner was found guilty, the facts to be taken to be that he forged the document in question, with the general intent to in-

duce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons, with the particular intent to induce such belief in those persons, but that he had no intent in forging, or in the uttering and publishing (assuming there was one), to commit any particular fraud or specific wrong to any individual. * * *

JERVIS, C. J.[27] I am of opinion that this conviction is wrong. The recent statute for further improving the administration of criminal justice (St. 14 & 15 Vict. c. 100) alters and affects the forms of pleadings only, and does not alter the character of the offense charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but, whether it is or not, in order to make out the offense there must have been, at the time of the instrument being forged, an intention to defraud some person. Here there was no such intent at that time, and there was no uttering at the time when it is said there was an intention to defraud.

Conviction quashed.

[27] The statement of facts is abridged and the concurring opinions of Wightman, J., and Bramwell, B., are omitted.

OFFENSES AGAINST THE PUBLIC HEALTH, SAFETY, COMFORT AND MORALS

I. Nuisance in General [1]

BELL v. STATE.

(Supreme Court of Tennessee, 1851. 1 Swan, 42.)

McKINNEY, J.,[2] delivered the opinion of the court.

The plaintiff in error was indicted and convicted in the circuit court of Blount for the utterance of certain grossly obscene words in public, and in the hearing of divers persons, in the town of Louisville, in said county. The different words alleged to have been spoken are set forth in three different counts. This was necessary to the validity of the indictment, but we omit to repeat them here, because of their extremely vulgar and offensive character. It is sufficient to state that they relate to acts of criminal intercourse alleged by the defendant to have taken place between him and the daughters of Abraham Hartsell, and to a loathsome disease, said by the defendant to have been contracted by him from the wife of Hiram Hartsell.

Two questions are presented for our determination: First, is the utterance of obscene words, in public, an indictable offense? And, if so, secondly, are the words proved sufficient to support the charges in the indictment?

Upon the first point the argument for the plaintiff in error rests upon the narrow and unsubstantial ground that no precedent or adjudication has been found in support of such an indictment. Admitting this to be true for the present, what does it establish?

If the case stated in the indictment falls within the operation of clear, well-defined, and well-established principles of law, it is to be urged against the maintenance of this prosecution that no similar case has heretofore occurred calling for the like application of such principles? Surely not, at this day. Are not innumerable instances to be found in the modern Reports, both of England and America, in which the liberal, enlightened, and expansive principles of the common law have been adapted and applied to new cases, for which no precedents were to be found, so as to meet the ever-varying condition and emergencies

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 115.

[2] Part of the opinion is omitted.

of society? And this must continue to be so, unless a stop be put to all further progress of society, and unless a stop be also put to the further workings of depraved human nature, in seeking out new inventions to evade the law.

What, then, are the well-established principles of the common law applicable to the present case?

The distinguished commentator on the laws of England informs us that upon the foundations of the law of nature and the law of revelation all human laws depend. 1 Bl. Com. 42. The municipal law looks to something more than merely the protection of the lives, the liberty, and the property of the people. Regarding Christianity as part of the law of the land, it respects and protects its institutions, and assumes likewise to regulate the public morals and decency of the community. The same enlightened author (1 Bl. Com. 124) distinguishes between the absolute and relative duties of individuals as members of society. He shows very clearly that, while human laws cannot be expected to enforce the former, their proper concern is with social and relative duties; municipal law being intended only to regulate the conduct of men, considered under various relations, as members of civil society. Hence he lays it down that, however abandoned in his principles or vicious in his practice a man may be, provided he keeps his wickedness to himself and does not offend against the rules of public decency, he is out of the reach of human laws. But, says the learned writer, if he make his vices public, though they be such as seem principally to affect himself—as drunkenness, or the like—they then become, by the bad example they set, of pernicious effect to society; and therefore it is then the business of human laws to correct them. See, also, 4 Bl. Com. 41, 42. * * *

These principles have been fully recognized by this court. In the case of Grisham and Ligan v. State, 2 Yerg. (Tenn.) 589, that thorough common lawyer, the late Judge Whyte, declared that "the common law is the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good morals." And he adds, in another part of the same opinion: "We have the express authority of the common law, as declared by the judges in the courts of justice, that all offenses against good morals are cognizable and punishable in the temporal courts that are not particularly assigned to the spiritual court."

The books of reports, both of England and this country, abound with cases where, upon these principles of the common law, convictions have been enforced for various offenses against public morality and decency, without the aid of any statutory enactment. And surely it can be no reason for the relaxation of these salutary principles, but rather the contrary, that in this country we have no "spiritual court," to lend its aid in the suppression of the numerous offenses falling within the class now under consideration, and that such of them as cannot

be reached in the mode pursued in the case before us must "go unwhipped of justice."

It would be tedious to enumerate the cases in which offenses have been held indictable as contra bonos mores. A few will suffice for the present purpose. Public drunkenness, 4 Bl. Com. 41. All indecent exposure of one's person to the public view, Id. 65, note 25. In the case of Rex v. Crunden, 2 Campb. 89, 1 Russ. on Crimes, 302, it was held an indictable offense to bathe in the sea near inhabited houses, from which the person might be seen, although the houses had been recently erected, and previously thereto it had been used for persons in great numbers to bathe at such place. And it was so held for the reason "that, whatever place becomes the habitation of civilized men, there the laws of decency must be enforced." * * *

These adjudications, without citing others, we think furnish analogies sufficiently strong to sustain the present prosecution. Are the outrageously vulgar and obscene words found in this record, if uttered in the ear of the public, less likely to shock any one's sense of decency, and to corrupt the morals of society—not to speak of their inevitable tendency to provoke violence and bloodshed—than the offenses charged in the several adjudicated cases above cited? It does not so appear to us. But, were there no analogy to be drawn from any decided case, we hold that, upon the broad principles of the common law which we have stated, this prosecution is most amply sustained. Thus fortified by sound principles—principles which lie at the foundation of every well-regulated community—(and resting on a basis so immutable) we are the more indifferent as to precedents exactly in point. * * *

Let the judgment be affirmed.

REX v. VANTANDILLO.

(King's Bench, 1815. 4 Maule & S. 73.)

The defendant was indicted for carrying her child while infected with the smallpox along a public highway. * * *

Owen moved in arrest of judgment, that this was an indictment of the first impression. He observed that the defendant was not indicted for inoculating, or causing the child to be inoculated, with an infectious disease; for it is not stated how the child came by it. And it is consistent with this indictment that the child might have caught the disease; and, supposing it had, might not the mother carry it through the street in order to procure medical advice without being subject to be indicted for it? Therefore the indictment ought to have shown that the act was unlawful, and ought also to have alleged that there was some sore upon the child at the time when it was so carried, by anal-

ogy to the writ "de leproso amoyendo," which, it seems, lay only for those who appeared to the sight of all men by their voice and sores to be lepers, and not for those infected with the disease, but not outwardly in their bodies. See Fitz. N. B. 534. And if the merely alleging that the disorder is infectious and dangerous to the subjects be sufficient, there is a multitude of diseases of which the same may be predicated, and consequently the patient during the continuance of any such disease must never go abroad at all, so difficult will it be to draw the line. The only offenses against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine (Hawk. P. C. cc. 52, 53); and Lord Hardwicke, it appears, thought the building of a house for the reception of patients inoculated with the smallpox was not a public nuisance, and mentioned that upon an indictment of that kind there had lately been an acquittal. And he added that the fears of mankind, though they may be reasonable, will not create a nuisance (3 Atk. 750). * * *

LE BLANC, J.,[a] in passing sentence, observed that although the court had not found upon its records any prosecution for this specific offense, yet there could be no doubt in point of law that if a person unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. However, the court was not disposed upon the present occasion to impute to the defendant an intention of being the cause of the consequences which had followed. Neither did they pronounce that every person who inoculated for this disease was guilty of an offense, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. In such a case the law did not pronounce it to be an offense. But no person having a disorder of this description upon him ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects.

The defendant was sentenced to imprisonment in the custody of the marshal for three calendar months.

[a] The statement of facts is abridged and the opinion of Lord Ellenborough, C. J., is omitted.

PEOPLE v. DETROIT WHITE LEAD WORKS.

(Supreme Court of Michigan, 1890. 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.)

GRANT, J.[4] This case is brought to this court by writ of certiorari from the Recorder's Court of the city of Detroit.

The defendants were convicted of unlawfully and wilfully creating and maintaining a nuisance, consisting of the creation and emission of unwholesome, offensive, and nauseating odors, smells, vapors, and smoke, to the great damage and common nuisance of all people living in the neighborhood thereof, and of all people passing and repassing on the streets and alleys adjacent thereto, contrary to an ordinance of the city in such case made and provided, being section 5, c. 55, Rev. Ord. 1884. The ordinance in question is set forth in the return of the judge to the writ.

The defendant the Detroit White Lead Works is a corporation organized under the laws of the state. Defendant Hinchman is president, defendant Dean is vice-president, and defendant Rogers is treasurer and manager. The defendants Hinchman, Dean, and Rogers were fined $1 each, and the defendant the Detroit White Lead Works $10 and costs. No other penalty was imposed. * * *

The facts found and returned by the Recorder's Court clearly established a nuisance, according to all the authorities. These facts so found are conclusive in this court, and we can only apply the law to the facts. Counsel for defendants cannot, therefore, seriously contend that we can enter into a discussion and determination of that question, especially as the evidence is not before us.

Defendants are not aided by the fact found by the court that, during the time covered by the complaint, the business, in all respects, had been carried on in a careful and prudent manner, and nothing had been done by those managing it that was not a reasonable and necessary incident of the business; nor by the further fact that, when the defendant company commenced its business, the lands in the vicinity of its works were open common. It is undoubtedly true that the defendants, or their predecessors, established their works at a point remote from habitation, possibly in recognition of the fact that such a business was at least not pleasant, if not injurious, to the health and enjoyment of those living near it. The city of Detroit has extended to the defendants' works, and the owners of adjoining lands have erected dwellings thereon. This they, of course, had the legal right to do. The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with them. Whenever such a business becomes a nuisance, it must give

[4] Part of the opinion is omitted.

way to the rights of the public, and the owners thereof must either devise some means to avoid the nuisance, or must remove or cease the business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is useful or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuis. par. 19; Queen v. Train, 2 Best & S. 640; Works v. Railroad Co., 5 McLean, 425, Fed. Cas. No. 18,046; Respublica v. Caldwell, 1 Dall. (Pa.) 150, 1 L. Ed. 77; Ross v. Butler, 19 N. J. Eq. 296, 97 Am. Dec. 654; Robinson v. Baugh, 31 Mich. 290.

It is true that, in places of population and business, not everything that causes discomfort, inconvenience, and annoyance, or which, perhaps, may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort, and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was Gilbert v. Showerman, 23 Mich. 448. A case similar in its facts was before this court in Robinson v. Baugh, 31 Mich. 290, which was distinguished by the court from Gilbert v. Showerman.

In the former case the business was legitimate and necessary. The suit was brought in equity to enjoin the business at the place where carried on. The facts were that smoke and soot from defendant's works were often borne by the wind in large amounts to the premises of the complainants, and sometimes entered their dwellings by the chimneys, and through cracks by the doors and windows, in such measure as to be extremely offensive and harmful, and the noise so great as to be disagreeable, and positively hurtful, the jar annoying and disturbing the sick, and in some cases causing substantial damage to dwellings. The court laid down the rule [31 Mich. 296] as follows: "However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably, and substantially damages the property of others, unless, indeed, the operator is able to plant himself on some peculiar ground of grant, covenant, license, or privilege which ought to prevail against complainants, or on some prescriptive right, and which in this country can rarely happen."

No case has been cited, and we think none can be found, sustaining the continuance of a business in the midst of a populous community, which constantly produces odors, smoke, and soot of such a noxious character, and to such an extent, that they produce headache, nausea, vomiting, and other pains and aches injurious to health, and taint the food of the inhabitants.

All the defendants were properly convicted. The officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are persons primarily responsible, and therefore the proper ones to be prosecuted. A fine can be collected against the defendant company, and therefore it is subject to prosecution. * * *

II. Bigamy[6]

LANE v. STATE.

(Supreme Court of Mississippi, 1903. 82 Miss. 555, 34 South. 353.)

Mason Lane, alias Jean Skyles, was convicted of bigamy, and appeals.

WHITFIELD, C. J. The rule is thoroughly settled that one indicted for bigamy must be acquitted on that indictment if he can show that the first marriage alleged in the indictment is void by reason of the existence of a prior lawful marriage, still existing. State v. Goodrich, 14 W. Va. 834; Commonwealth v. McGrath, 140 Mass. at pages 297, 298, 6 N. E. 515; Am. & Eng. Enc. of Law (2d Ed.) vol. 4, p. 38; Crawford's Case, 73 Miss. 172, 18 South. 848, 35 L. R. A. 224. In Goodrich's Case, supra, the court said: "The defense which the prisoner sought to establish by the evidence which the court rejected was that he had on the 30th of April, 1873, in Union county, Ohio, been lawfully married, according to the laws of Ohio, to Sarah Snodgrass, and that she was still living, and that this marriage was in full force when he was married on the 29th day of November, 1874, to Frances L. Smith, in Wisconsin; that, he (the prisoner) being then a married man, this marriage to Frances L. Smith was a mere nullity, and absolutely void ab initio. The indictment alleged the offense of the prisoner to be the marrying by the prisoner on May 5, 1877, in Iowa, of Clara Allen, while his wife, Frances L. Smith, was living. It was incumbent on the state to show that Frances L. Smith was his lawful wife, and the prisoner's defense, sought to be established by the evidence rejected by the court, was that Frances L. Smith was never the lawful wife of the prisoner, as he was a married man when he married her. If the first marriage laid in the indictment was a nullity,

[6] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 116, 117.

then the second marriage laid in the indictment could not constitute the offense of bigamy; and, if the prisoner was a married man when the first marriage charged in the indictment took place, this marriage was an absolute nullity in Wisconsin." The Attorney General, with that commendable frankness which has always characterized his conduct of cases at this bar, confesses that this error is fatal. The authorities speak but one voice on the subject.

The case made here is this: The indictment charges that the appellant on the 12th of January, 1903, married, in Mississippi, Teresa Whetstone, having theretofore married Rosa Pitts; Rosa Pitts being alive at the time of the marriage to Teresa Whetstone. The evidence shows that appellant was married on the 6th of September, 1900, to Patty Morris, at Carville, in the state of Texas; second, that appellant married Rosa Pitts, at Russellville, in the state of Arkansas, subsequently, whilst Patty Morris was still living and his lawful wife; and, third, that afterwards, whilst both of these women were alive, he married in this state Teresa Whetstone. Under the authorities cited upon these facts, it is obvious that the court should have given the twelfth charged asked by the defendant, which is, in effect, a peremptory charge. The first marriage alleged in the indictment being the one with Rosa Pitts, and that marriage being void because appellant had theretofore been lawfully married to Patty Morris, who was then living, and who was also living at the time of the marriage to Teresa Whetstone, the defendant could not be convicted of bigamy under this indictment and proof.

Reversed and remanded.

HARRISON v. STATE.

(Court of Criminal Appeals of Texas, 1902. 44 Tex. Cr. R. 164, 69 S. W. 500.)

DAVIDSON, P. J.[6] Appellant was convicted of bigamy, and given four years in the penitentiary. * * *

It was further contended that the testimony is not sufficient to support the finding of the jury. Mrs. Sovey, who was appellant's second wife, testified that she knew appellant had another living wife at the time she married him; that he informed her such was the fact. She further stated: "I knew that Mr. Harrison and myself were both doing no wrong, as we had both gone to God and prayed over the matter. He told us that Mr. Harrison's first marriage was wrong in the sight of God, and that he would do no wrong in getting married."

Appellant took the stand, and stated that he married Mrs. Earl and lived with her about a year. He stated that he was a minister of the

[6] Part of the opinion of Davidson, P. J., and the dissenting opinion of Henderson, J., are omitted.

gospel, and believed it was right for him to leave his first wife and marry the second one; that God had informed him that he could not pursue his work as a minister successfully as long as he lived with this woman; that he did not procure a divorce, as it was not necessary, as God told him in a vision that it would not be wrong for him to marry the second time without getting the divorce; that God came to him in visions, and whatever He commanded him to do, he did it, regardless of consequences; that when God commanded him to do a thing, no matter what the law was with which it came in conflict, he would do it, regarding the law of God as superior to the law of man. He denied being crazy, and asserted that he was not trying to play crazy; that in his ministerial work he had always obeyed the command of God, and that God had wonderfully blessed his work; that he had 60 conversions within the last few days, etc.; that he knew the laws of Texas required the marriage ceremony; that a second marriage without divorce was against the law, and a penitentiary offense. He knew it was wrong, according to human laws, but acted under Divine guidance.

Dr. Howard testified that he knew defendant; saw him in the county jail; observed his actions and talked with him and heard his testimony; that he was insane; that he did not believe he was able to distinguish between right and wrong, with regard to the crime of bigamy. "I think he has what is known as 'religious insanity,' or, in other words, 'emotional insanity.'" He gave it as his opinion that appellant was not capable of judging between right and wrong, in marrying the second wife while his first was alive; that a man whose mind was in such a diseased condition that he believed he had personal revelation from God, and visions directing him in important undertakings, and these delusions continued in waking hours as real to him, and such condition continued through a space of years, would not, in his opinion, be capable of judging between right and wrong in regard to any action closely connected with such delusions. Dr. Walker testified that he saw defendant in the county jail a few weeks before the trial. He seemed to be suffering under some delusion caused by starvation or indigestion.

Walker, a farmer, testified that he lived close neighbor to defendant since his marriage with Mrs. Sovey, his second wife; that he had no particular dealings with him, but had frequently been in his company; had often heard him preach, and, in his opinion, appellant was of sound mind, and knew right from wrong. Such delusions and visions as defendant seemed to have could have been caused by either starvation or indigestion. He expressed the opinion that if such condition continued through a term of years, and the party believed while awake, as well as in his dreams, that he had personal conversations with God, and God advised him in all important undertakings, and was in the habit of going down on his face before the Lord, and that such

visions seemed to be real to him and were frequent, such a man would not be responsible.

Costley testified that he was the jailer who had Harrison in charge while confined, and watched him closely. He did not think appellant crazy, but thought he was "nutty" on the subject of religion; that he was continually shouting and preaching, and seemed to be laboring under the delusion that he was converting large numbers of people. He did not know whether appellant fasted 20 days, except from what other prisoners in the jail told him; that he did not know, from a scientific standpoint, whether or not appellant was crazy.

This is the substance of the testimony found in the record. The evidence of those witnesses who testify to their belief that he was insane confines it to the issue of moral insanity—moral insanity reaching the point of irresistible impulse. If the party could distinguish between the right and wrong of the act he was doing, it is not a defense to an act which would otherwise be criminal. Mr. Buswell says: "It seems that evidence as to a party's religious, political, or moral beliefs, if unsupported by other testimony, will not generally be admitted to prove his insanity." Busw. Insan. par. 210. The same author says (section 10): "No perversion of the moral affections and propensities, unless accompanied by such delusion as indicates the subversion of the will and reason, is to be regarded as constituting insanity in law. Thus moral insanity, or the perversity of the moral feelings, is of itself insufficient to invalidate the civil act, or excuse the criminal act, of its subject." This author cites Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731, which contains the doctrine "that the law does not recognize the form of insanity in which the capacity of distinguishing between right and wrong exists, without the power of choosing between them." Again, Mr. Buswell, following McNaghten's Case, 10 Clark & F. 200 (section 437), says "that a party who is indicted is not entitled to acquittal on the ground of insanity if at the time of the alleged offense he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character, and consequence of his act, and had mental power sufficient to apply that knowledge to his own act." In the same work (section 435) this language is found: "If the party had at the time of the commission of the act such degree of reason and understanding as is sufficient to enable him to understand that his act was forbidden by law, and that the law directed that the person who did such act should be punished, he is responsible." See, also, Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. 361; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

Under the authorities and the rule in regard to the questions involved in this case, appellant evidently knew it was wrong to marry the second time. He knew it was in violation of law to marry without a divorce. If appellant's contention becomes the law of this

state, the sacrament of plural marriages of the Mormon Church would exempt from punishment all the disciples of Brigham Young and Joseph Smith who practiced polygamy in this state.

We are of opinion that the verdict of the jury is correct, and the judgment is in all things affirmed.

III. Adultery [7]

STATE v. BIGELOW.

(Supreme Court of Vermont, Caledonia, 1915. 92 Atl. 978.)

Bert Bigelow was convicted of adultery, and his motion for arrest of judgment was overruled, and he excepts.

TAYLOR, J. This is an information for adultery. The respondent pleaded guilty, and thereupon moved in arrest of judgment on the ground that no offense is charged in the information. The motion was overruled, to which the respondent excepted. There was judgment and sentence, the execution of which was stayed, and the cause passed to this court.

The information charges, with proper allegations of time and place, that the respondent, a single man, carnally knew one ———, a married woman, then and there having a lawful husband living, naming him, and not then and there being the wife of the respondent, and that he did then and there commit the crime of adultery with the said ———. The contention of the respondent is that a singe man who has illicit sexual intercourse with a married woman is not guilty of adultery, in the absence of a statute to that effect. This claim finds support among some text-writers and in the decisions of a few states cited in respondent's brief. See Bish. on Stat. Crimes, pars. 655–657; 2 Greenleaf on Ev. par. 48; Respublica v. Roberts, 1 Yeates (Pa.) 6; Com. v. Lafferty, 6 Grat. (47 Va.) 672; Hunter v. U. S., 1 Pin. (Wis.) 91, 39 Am. Dec. 277. While reference to the question has been made in our decisions, it appears never before to have been squarely raised in this state. The question turns upon the definition of the term "adultery," as used in P. S. 5881, upon which this prosecution is based. This statute does not define the offense, but punishes what was known as adultery under the common law, referring to it by name; so we must look to that source for its definition. State v. Clark, 83 Vt. 305, 308, 75 Atl. 534, Ann. Cas. 1912A, 261.

[7] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 118, 119.

Adultery was a private wrong at the common law as it existed at the time of its adoption by our Legislature, but was an offense against the ecclesiastical law. As known to the common law, as distinguished from ecclesiastical law, adultery consisted of sexual intercourse by a man, married or single, with a married woman, not his wife. The circumstance on which adultery depended at common law was the possibility of introducing spurious issue; in other words, its tendency to adulterate the issue of an innocent husband and turn the inheritance away from his own blood to that of a stranger. One R. C. L. 633, and cases cited. At the same time the ecclesiastical law dealt with unlawful sexual commerce as a breach of the marriage vow, and punished only the married party for adultery, while as to the unmarried person the offense was fornication. Bashford v. Wells, 78 Kan. 295, 96 Pac. 663, 18 L. R. A. (N. S.) 580, 16 Ann. Cas. 310, and note. The latter view of adultery is embodied in P. S. 5882, which declares that a married man and an unmarried woman, who commit an act which would be adultery if such woman were married, shall each be guilty of adultery. State v. Clark, supra. The adoption in 1818 of what is now P. S. 5882, as an amendment of the statute of 1797, which made adultery an indictable offense, clearly indicates that the common-law, and not the ecclesiastical, meaning of the term was employed in the original statute, for otherwise the amendment would have been unnecessary.

Consideration of the opposing theories of adultery at common law and in the ecclesiastical courts makes it apparent that in the former there was no reason for distinguishing between a married and a single man, the particeps being a married woman; while in the latter the guilt inhered in the breach of the marriage vow, and so the offense could not be committed by an unmarried person, man or woman. Respondent's counsel argues that the amendment of 1818 shows that, but for that statute (now P. S. 5882), an unmarried particeps would not be guilty of adultery in this state. The argument loses sight of the common-law theory of adultery. The amendment recognized the true theory, and extended our statute so as to include what would be adultery by ecclesiastical law, but in no way restricted the common-law definition of the term.

It remains to consider whether, under the common-law definition of adultery, our statute makes both parties to the act guilty of the offense, or whether the fact of marriage on the part of the man is material. On this question the common law furnishes no direct authority; for, as we have seen, adultery was not an indictable offense at common law. That the wrong involved the man as well as the unfaithful wife is perfectly apparent. If we recur to the source from which the common-law idea of adultery sprung, we shall see that it regarded the man and woman alike. It found its root in the Mosaic law which provided: "If a man be found lying with a woman married to a husband, then they shall both of them die, the man that lay with the woman and the wo-

man." Deut. xxii, 22; Lev. xx, 10. The common-law idea of adultery prevailed in the Mosaic law, for by the latter the man was condemned, not because he had violated his matrimonial vow, but "because he hath humbled his neighbor's wife." Deut. xxii, 24.

Turning to the decisions of our sister states, that have made adultery an indictable offense, without defining the term, we discover a well-defined line of cleavage between them. In the jurisdictions holding that a single man is not guilty of adultery for sexual intercourse with a married woman, there is either, as was held in Respublica v. Roberts, supra, a compelling uniform practice, or some peculiar language of the statute, or, what is more often the case, they adopt the ecclesiastical, and not the common-law, definition of adultery. In those jurisdictions which adhere to the common-law definition, it is held that a single man is guilty of adultery, even in the absence of any express declaration in the statute. State v. Wallace, 9 N. H. 515; Smitherman v. State, 27 Ala. 23; State v. Pearce, 2 Blackf. (Ind.) 318; State v. Connoway, Tappan (Ohio) 90; note 16 Ann. Cas. 314; See Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; 1 R. C. L. 631.

Having adopted the common-law definition of adultery, we regard it as the settled law of this state that any man, married or single, having voluntary sexual intercourse with a married woman, not his wife, is guilty of adultery under P. S. 5881. State v. Searle, 56 Vt. 516; State v. Bisbee, 75 Vt. 293, 54 Atl. 1081. The fact that the question has never before reached this court is a strong indication that the profession has not seriously doubted the view we now adopt. A uniform practice of more than a century, while it does not make the law, as said in Respublica v. Roberts, is strong evidence of what the law is. In the statute as amended in 1818 reference is made to the parties in a way to indicate an intention to punish the male particeps equally with the woman; besides, although ever since 1797 a single man has been deemed guilty under the so-called "blanket act" and since 1818 a single woman having sexual intercourse with a married man has been deemed guilty of adultery, a single man having sexual intercourse with a married woman has been outside the pale of the law, unless the Legislature intended that both parties to the act should be equally guilty of adultery. Taken together, these facts make it doubly certain that under the statute in question marriage on the part of the man is wholly immaterial. Our conclusion is that the county court did not err in overruling the respondent's motion in arrest of judgment.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exception. Let execution be done.

Held all guilty alike.

STATE v. AYLES.

(Supreme Court of Oregon, 1914. 145 Pac. 19.)

McNARY, J.* Convicted of adultery and sentenced to pass a term of six months in the county jail of Multnomah county, defendant prosecutes this appeal, and assigns as grounds therefor the commission by the court of 11 distinct errors. On the 30th day of January 1913, defendant and Lydia Mulloy were jointly indicted for the crime of adultery, committed as follows: "The said James G. Ayles and Lydia Mulloy, on the 13th day of January, A. D. 1913, in the county of Multnomah and state of Oregon, not being then and there married to each other, but the said Lydia Mulloy then and there having a husband living other than the same James G. Ayles, to wit, A. C. Mulloy, had carnal knowledge together each of the body of the other, and thereby committed adultery contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon." The defendants were tried together, the jury returning a verdict of guilty as to the defendant, and not guilty as to Lydia Mulloy.

We read from section 2072, L. O. L.: "A prosecution for the crime of adultery shall not be commenced except upon the complaint of the husband or wife, or if the crime be committed with an unmarried female under the age of twenty years upon the complaint of the wife, or of a parent or guardian of such unmarried female, and within one year from the time of committing the crime, or the time when the same shall come to the knowledge of such husband or wife or parent or guardian. When the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery also, and be punished accordingly."

Returning to the indictment, it will be observed that no mention is made that the action was initiated by the husband of Lydia Mulloy. The introductory part of the indictment merely recites that: "James Ayles and Lydia Mulloy are accused by the grand jury of the county of Multnomah and state of Oregon by this indictment of the crime of adultery."

Notwithstanding the statutory command that the prosecution shall be commenced only upon the complaint of the injured spouse, the cases hold that it is not necessary to allege such facts; for evidence thereof may be introduced without the averment. State v. Athey, 133 Iowa, 382, 108 N. W. 224; State v. Andrews, 95 Iowa, 451, 64 N. W. 404; State v. Maas, 83 Iowa, 469, 49 N. W. 1037; People v. Isham, 109 Mich. 72, 67 N. W. 819; State v. Brecht, 41 Minn. 50, 42 N. W. 602; 1 Cyc. 956.

* Part of the opinion is omitted.

It is claimed by defendant that the trial court committed a legal mistake in advising the jury that, "if one of the parties to the illicit intercourse is guilty, then both are guilty of adultery." Some courts advance the doctrine that, after the acquittal of one of the defendants in a joint charge of adultery, there can be no conviction of the other. This is not in accord with the better authority, and the proper rule appears to be that the acquittal of one of the defendants is no bar to the prosecution and conviction of the other defendant. While it is true that, to constitute adultery, there must be a joint physical act, it is not necessary that there should be a joint criminal intent. One party may be guilty and the other innocent, though the joint physical act necessary to constitute adultery is complete. State v. Eggleston, 45 Or. 346, 77 Pac. 738; State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599; Commonwealth v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248; 1 R. C. L. 644. Unquestionably, the trial court missed the law when he told the jury that, "if one of the defendants is guilty, then both are guilty." However, we fail to discern where this instruction injuriously affected the defendant, because it is a more favorable statement than the law sanctions or than defendant might expect. In a case where the court erroneously instructs the jury to the advantage of defendant, and the jury acts in accordance with the law and in disregard of the instructions, the defendant cannot be heard to say that he has been injured.

Defendant's strongest contention is that the court erred in refusing to admit evidence tending to show that the husband of Lydia Mulloy connived with and abetted defendant in the commission of the act of adultery. Defendant invokes the benefit of the same theory in the following requested instruction: "I instruct you that, if you find from the evidence that the prosecuting witness, A. C. Mulloy, the husband of Lydia L. Mulloy, one of the defendants herein, acquiesced in or assented to the act or acts of sexual intercourse between the defendants, Lydia L. Mulloy and James G. Ayles, if you find any act or acts of sexual intercourse between said defendants did occur, then you should find the defendant James G. Ayles not guilty."

An outline of the testimony proffered by defendant is: That the defendant Lydia Mulloy, when a girl under 17 years of age, was seduced by A. C. Mulloy, who subsequently married her in order to cover the infamy of the crime; that since the time of their marriage the husband has been seeking to invent grounds for a separation and divorce; that he insisted upon his wife remaining alone in the house with defendant while he (Mulloy) absented himself therefrom; that the husband connived in every imaginable way to throw his wife in the company of the defendant by having defendant assist his wife in washing dishes and helping her about the kitchen and house; that during some festive occasion at Hillsboro Mr. Mulloy entered a saloon, and, in the presence of several witnesses, stated that he had left defendant to

bring his wife in from the farm, and that he "hoped to God he would run off with her"; that defendant was solicited by Mr. Mulloy "to have intercourse with his wife by inference and innuendos"; that Mulloy stated in the presence of defendant, and to him directly, that he didn't care if he caught somebody having connection with his wife, because he wanted to get a divorce from her; that the husband knew his wife and defendant were going to Portland; and that defendant had assurance that he would not be harmed.

With much pressure it is argued that, if these things were true, defendant could not be convicted of the offense, for the reason that he was induced to commit the act. The books abound with much learning upon this interesting department of the criminal law. Nevertheless our steps have not been guided by the light of adjudged cases involving the crime of adultery. Still we feel no reason for hesitating to announce the rule that seems to us best adapted to the promotion of justice. * * *

The fact that the husband may have been guilty of sinful conduct which encouraged the defendant to commit the crime does not lessen or in any manner affect the wrong which society suffers, and public policy, good morals, common decency, and considerations of justice demand the punishment of the offense under such circumstances as strongly as though the crime had been committed by stealth and through the employment of agencies unknown to the husband. For these reasons the evidence was properly excluded, and instructions properly refused. Well may we add that, if the rejected testimony is true, offended justice has not yet been fully vindicated. * * *

There are a few additional questions presented on behalf of defendant, and which we have examined, and deem them not of sufficient importance to require separate notice; therefore the judgment of conviction is affirmed.

IV. Lewdness and Illicit Cohabitation [9]

UNITED STATES v. SNOW.

(Supreme Court of Utah, 1886. 4 Utah, 280, 9 Pac. 501.)

Appeal from a judgment of the district court of the first district, and from an order refusing a new trial. * * *

ZANE, C. J.[10] The defendant was convicted of the crime of unlawful cohabitation and sentenced to imprisonment in the penitentiary for

[9] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 122.

[10] The statement of facts and part of the opinion are omitted.

the term of six months, and to pay a fine of three hundred dollars and the costs of the prosecution. From this judgment he has appealed to this court, and insists that the evidence is insufficient to justify the verdict.

At the commencement of the trial the defendant admitted before the court and jury that he had married each of the seven women named in the indictment; had not been divorced from either, and that he claimed all of them as his wives and furnished them support. * * *

It appears from the evidence that appellant boards and lodges with his last wife, and visits his other wives occasionally, though not very often; that during the year 1885 he has not lodged or taken a meal with any one of the others; that he furnishes them houses to live in, and supports them; that he introduces them publicly as his wives, and by his language and conduct holds them out to the world as such. The evidence proved beyond controversy that defendant cohabits with his polygamous wife Minnie. The remaining fact to find from the evidence is, Has he at any time during the year 1885 cohabited with the other women named in the indictment, or any one of them? It appears from the evidence that defendant is seventy-two years old, and has married nine wives, and that seven of those wives are still living. To the first he was married in his youth. As his passion for one wife became satiated, and dulled by indulgence and gratification, and as his lust was again kindled by the appearance of a younger and fresher, or possibly a more attractive woman, he would marry again until his marriages have been repeated nine times, and now, at the age of seventy-two years, he is found with seven living wives—the last being comparatively young, with an infant in her arms. He furnishes homes for, supports, associates with, claims, holds out, and flaunts in the face of society all these seven women as his wives. And yet he says he cohabits with but one. The law must characterize his relation to them, and his intercourse and association with them. Let us consider the case with respect to Sarah, his lawful wife.

A lawful marriage of itself affords a strong presumption of matrimonial cohabitation, because such cohabitation is in accordance with duty and usually attends such a marriage. When to this presumption are added the further inferences from the following facts: that defendant claimed Sarah all the time as his wife, and that she claims to be such; that he provides for her a home, and the necessaries and comforts of life; that they were on good terms; that he took her to the theatre, out riding, visited her occasionally at her home, and was the father of her children—the conclusion removes every reasonable doubt that he cohabited with her as his wife. When they were associating together she was not his paramour or his friend simply—he then had and still has all the rights and opportunities of a husband, and she those of a wife. They were living together. Under such cir-

cumstances the law will not permit them to say they were together merely as friends, and not as husband and wife.

It is not essential to matrimonial cohabitation that the parties should be together all the time if their intercourse and relations are agreeable and they associate together some part of the time. In that case the law does not notice the intervals of separation. Owing to the necessities of human life, and the claims of business and trade, married people are often in each other's company less for long periods than the defendant and his wife Sarah were during the year 1885, and yet they are regarded as cohabiting as man and wife. Such is often the case with mariners, traveling salesmen, and other classes of persons that could be mentioned. They associate at long intervals, and are regarded as cohabiting. * * *

In construing the term "cohabitation," as used in the act under consideration, the supreme court of the United States say, in the case of Cannon v. United States, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561: "It is the practice of unlawful cohabitation with more than one woman that is aimed at—a cohabitation classed with polygamy and having its outward semblance. It is not, on the one hand, meretricious unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the territorial government; nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy, when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household with all the outward appearance of the continuance of the same relations which existed before the act was passed, and without reference to what may occur in the privacy of those relations." * * *

The evidence against the defendant shows one of the most aggravated cases and worst examples of polygamy. He has one lawful and six plural wives living, and all of them he maintains and publicly acknowledges by introducing them as such; but claims that he is cohabiting with but one and visiting the others when he pleases. We are of the opinion that the evidence was sufficient to justify the verdict. * * *

After a careful examination of this record we find no ground sufficient to reverse the judgment of the district court, and it is therefore affirmed.

V. Incest [11]

STATE v. ELLIS.

(Supreme Court of Missouri, 1881. 74 Mo. 385, 41 Am. Rep. 321.)

HENRY, J. The defendant was indicted for incest, and found guilty at the March term, 1881, of the St. Louis criminal court, and the judgment of that court having been affirmed by the Court of Appeals, he has appealed to this court. The alleged incest was the commission of fornication with Mary Belle Ellis, his daughter, and she testified that he had frequently had sexual connection with her, but "that he made her do it," and that "she did not tell of it because afraid that he would beat her—that he threatened to beat her if she told any one." At the time of the connection alleged in the indictment she was over twelve years of age. The crime alleged is punishable by imprisonment in the penitentiary for a term not exceeding seven years. The court instructed the jury that: "If defendant is the natural parent of the girl, Mary Belle Ellis, and at, etc., * * * he did feloniously and incestuously commit fornication with her, by actually, and with full knowledge of the relationship, etc., having carnal knowledge of her person, whether with or without her consent, you will find him guilty of incest."

By section 1253 the crime of rape is punishable by death or imprisonment in the penitentiary for a term not less than five years. The crime of incest is punishable by imprisonment in the penitentiary only. Rev. St. 1879, § 1538. The crime of rape is of a higher nature than that of incest, and, when the evidence proves the commission of rape, the party cannot be convicted of incest. The lower is merged into the higher crime. It was so held in People v. Harriden, 1 Parker, Cr. R. (N. Y.) 344; Croghan v. State, 22 Wis. 444; De Groat v. People, 39 Mich. 124; State v. Thomas, 53 Iowa, 214, 4 N. W. 908. The case of Com. v. Moses Goodhue, 2 Metc. (Mass.) 193, was one in which the defendant was indicted for a rape, and it was held that he might be convicted of incest on that indictment. This was under a section of the statute of that state which was held by the court to sanction that ruling; but it was also decided that the jury could return such a verdict only in case they should not find that the rape was proved.

We do not hold it necessary that both parties must be guilty of the crime of incest before the guilty one can be convicted. For instance, if in this case, the defendant was aware of the relationship between

[11] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 123.

him and Mary Belle, and she was ignorant of it, he would be guilty and punishable under the statute, if the illicit connection was by mutual consent, although she could not have been guilty of incest because ignorant of the relationship existing between her and the defendant. Whether the defendant had sexual intercourse with his daughter with her consent, was a question which should have been submitted to the jury, with a direction to convict, if satisfied that she consented, and to acquit the defendant if he forced her to submit.

We think the objections to the indictment cannot be sustained, and the reasons for so holding are well stated by the court of appeals in its opinion delivered in this case. For the error in the instruction above noted, the judgment is reversed and the cause remanded. All concur, except NORTON, J., who dissents.

VI. Seduction [12]

STATE v. BROCK.

(Supreme Court of Missouri, 1905. 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625, 2 Ann. Cas. 768.)

BURGESS, P. J.[13] The defendant was convicted in the circuit court of Polk county, and his punishment fixed at a fine of $300, and imprisonment for 30 days in the county jail of said county, under an information filed by L. Cunningham, the prosecuting attorney of said county, with the clerk of the circuit court of said county, on the 4th day of August, 1903, charging him with having feloniously, under promise of marriage, seduced and debauched one Iva Fender, an unmarried female of good repute and under 21 years of age. Defendant appeals. * * *

The point is made that at the time of the alleged contract of marriage the defendant was under age, and incapable of entering into a valid contract of that character, and therefore was not guilty, and could not have been guilty, of the crime of seducing and debauching the prosecuting witness under promise of marriage. But we are unable to appreciate the force of this contention. The statute (section 1844, Rev. St. 1899) is leveled at any person who shall, under or by promise of marriage, seduce or debauch any unmarried female of good repute and under 21 years of age, thus ignoring entirely the question of his age;

[12] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 128.
[13] Part of the opinion is omitted.

and, clearly, the question of the power of such a person to make a valid contract of marriage is foreign to any issue in the case. Any person capable of seducing and debauching a female can make a promise of marriage, whatever his age may be, and it is sufficient that he make such a promise, and, in consequence of it, commits the crime. It is idle to say that the defendant was not capable of making such a promise at the time alleged in the information, although he may not have been competent, because of his minority, to make a valid contract—such a one as he could have been compelled by legal proceeding to comply with or to respond in damages for its violation. It would be strange, indeed, if a person could in this way violate both law and morals, and not be held amenable to the law, but shield himself upon the ground that he was not capable of making a valid contract. Such is not the law.

In behalf of the state the court gave the usual instruction upon the question of the flight of the defendant for the purpose of avoiding arrest for the crime with which he is charged, which it is earnestly insisted was unauthorized by the evidence, and should not have been given. But we are unable to concur in this position. On the contrary, we think the evidence, without repeating it, well warranted the instruction; hence it was not erroneous. * * *

For the reasons stated, we are of the opinion that the judgment should be affirmed. It is so ordered. All concur.

COMMONWEALTH v. HODGKINS.

(Court of Appeals of Kentucky, 1901. 111 Ky. 584, 64 S. W. 414, 23 Ky. Law Rep. 829.)

Floyd Hodgkins was acquitted of the offense of seduction, and the Commonwealth appeals.

DU RELLE, J. Appellee, having been indicted under section 1214 of the Kentucky Statutes, at the conclusion of the commonwealth's testimony, moved the court for a peremptory instruction to the jury to find him not guilty, which motion was sustained, and the commonwealth has appealed. Section 1214 provides: "Whoever shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age, shall be guilty of a felony, and upon conviction thereof, shall be confined in the penitentiary not less than one year nor more than five years. No prosecution shall be instituted when the person charged shall have married the girl seduced; and any prosecution instituted shall be discontinued, if the party accused marry the girl seduced before final judgment."

The prosecutrix, upon direct examination, testified to facts which would have amply justified the submission of the case to the jury, viz.:

That appellee seduced her under promise of marriage, and by means of such promise; that at the time of the seduction she was 18 years old, unmarried, and chaste; that he repeatedly visited her after the seduction, and renewed his promise; and that he renewed it after she became with child by him, but had finally refused to marry her. But she admitted that several months after the seduction appellee met her in company with one Libbs, a friend of his, and after some persuasion she took a drive in Libbs' buggy, to which appellee's horse had been hitched, and in the course of the drive Libbs had carnal knowledge of her by force; that she made outcry at the time, but did not then or thereafter report the fact. She, however, admitted the fact of her connection with Libbs upon this one occasion to appellee, upon his charging her with it.

The circuit court seems to have sustained the motion for a peremptory instruction upon the theory that a prosecution for this offense is analogous to an action for a breach of promise of marriage, and that anything which would relieve a defendant in such an action would relieve him of the consequences of his offense under this section. The court also seems to have assumed that the statement of the prosecutrix to the effect that Libbs' connection with her was forcible was entirely destroyed by her admission that she made no complaint. Without considering the latter question, we are clearly of opinion the court was in error as to the construction of the statute. The statute is not a mere means of compelling specific performance of a contract to marry under which seduction has been accomplished. Its object is to protect the virtue of young girls. It undertakes to accomplish that by the imposition of a penalty. For the benefit of the injured party, a locus penitentiae is given to the offender, so that by making amends, as far as may be, for his wrong, he may be relieved of its consequences. This court has held that if he offers to marry her, she cannot by refusal deprive him of the benefit of the statutory proviso. Com. v. Wright, 27 S. W. 815, 16 Ky. Law Rep. 251. But it is going too far to say that her subsequent conduct, possibly or probably induced by his offense, and possibly or probably by his collusion, can relieve him from the penal consequences of crime. The statute is not a mere attempt to enforce a certain class of contracts; it is legislation to suppress crime. By his violation of the statute, he subjected himself to the penalty denounced, and he can escape that penalty in the mode provided by the statute, and in no other.

No question is presented here as to the admissibility of testimony of unchaste conduct on the part of the prosecutrix soon after the alleged offense, as the evidence upon that subject was introduced by the prosecution.

For the reasons given, this opinion is ordered to be certified to the circuit court.

VII. Abortion [14]

MILLS v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1850. 13 Pa. 631.)

Error to the court of quarter sessions of Dauphin county.

Mills had been tried for an attempt to procure abortion of a female, tried at November sessions, 1849. Defendant was convicted and sentenced to undergo punishment in the Dauphin county prison by separate confinement at labor for and during the term of one year, to commence and be computed from the expiration of the sentence on the indictment for attempting to procure abortion of another female, etc. * * *

COULTER, J.[15] The error assigned is that the indictment charges the defendant, with intent to cause and procure the miscarriage and abortion of the said Mary Elizabeth Lutz, instead of charging the intent to cause and produce the miscarriage and abortion of the child. But it is a misconception of the learned counsel that no abortion can be predicated of the act of untimely birth by foul means.

Miscarriage, both in law and philology, means the bringing forth the fœtus before it is perfectly formed and capable of living, and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word "abortion" is synonymous and equivalent to "miscarriage" in its primary meaning. It has a secondary meaning, in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with or violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountain of life, and therefore it is punished.

The next error assigned is that it ought to have been charged in the count that the woman had become quick. But, although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this

[14] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 129–131.

[15] The statement of facts is abridged and part of the opinion is omitted.

indictment was therefore sufficient, to wit: "That she was then and there pregnant and big with child." By the well-settled and established doctrine of the common law, the civil rights of an infant in ventre sa mere are fully protected at all periods after conception. 3 Coke's Institutes. A count charging a wicked intent to procure miscarriage of a woman, "then and there being pregnant," by administering potions, etc., was held good on demurrer by the Supreme Court of this state. Mss. Reps. January, 1846; Whart. Crim. Law, 308. There was therefore a crime at common law sufficiently set forth and charged in the indictment.

But, although we see no error in the record, the sentence must be reformed on account of certain proceedings in this court and dehors this record. * * *

Judgment affirmed as modified.

OFFENSES AGAINST PUBLIC JUSTICE AND AUTHORITY

I. Obstructing Justice [1]

STATE v. HARTLEY.

(Supreme Court of Errors of Connecticut, 1901. 74 Conn. 64, 49 Atl. 860.)

Thomas K. Hartley was convicted of resisting and obstructing an officer in the discharge of his duty, and appeals.

TORRANCE, J. With reference to the first count of the complaint, it appears from the record that the state adduced substantially no evidence in proof of it, and that the court told the jury that their verdict upon it should be, "Not guilty." The case was thus in fact tried and decided upon the second count. In support of that count the material acts which the state claimed to have proved were, in substance, these: On the 12th of November, 1900, by virtue of a writ of attachment against one Gevers, Draper, a deputy sheriff, attached, as the property of Gevers, some household goods in the house occupied by Gevers. The goods were not removed from the house by the officer, but he, having obtained from Gevers' wife, the key to the front door of the house, gave it to the plaintiff in the writ of attachment, as keeper of the attached goods. On the next day the officer took the key into his own possession. Early in the morning of the 14th of November, 1900, the accused, who was a truckman, came with his wagon, at the request of Gevers, to remove said furniture to the freight depot. He found it outside of the house, loaded it upon his wagon, and drove away with it towards the depot. When he had gone a short distance, the officer, still holding the writ of attachment, met him near the Preston Bridge, and attempted to stop the team and retake the goods in the following manner: "He informed the accused that the goods upon the wagon were under attachment, and directed the accused to stop his team, under penalty of arrest, and to return the goods." The accused refused to stop his team, and directed his assistant to drive on, and he did so. The officer then arrested the accused. The evidence for the accused tended to prove that the officer did not attempt to retake or reattach the goods on the wagon at the time he met the accused near the bridge, nor did he then say to the accused that he attached them, and that the accused did not obstruct, resist, or abuse the officer while in the execution of his office.

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 135.

The reasons of appeal are eight in number, but it is unnecessary to consider any of them save the last. That one is based upon the failure of the court to answer properly the question asked by the foreman of the jury. After the court had charged the jury and they had retired to their room, they came back, and through their foreman said: "We ask for instructions from the court as to whether the demand made by the sheriff at the time he met these goods near the bridge constituted another attachment, or a renewal of his attachment." Prior to this the court, in its charge, had told the jury that unless they were satisfied "that the furniture was in the possession of the officer when it was taken away from the house, on the 14th of November, then the accused, in assisting in its removal or in attempting to remove it, was not guilty of obstructing the officer," and that "merely having the key or keys of the Gevers' premises would not necessarily, of itself, constitute such possession." The court then said: "Now, even if the attachment as originally made had been invalid for any reason, or even if the possession had terminated, yet the officer, with the writ of attachment in his hands, had a right to attach anew, and to retain and take possession of these goods; and the defendant had no right to obstruct or resist him in the execution of his office in making attachment, or taking possession of these goods when they were upon his wagon."

Upon the record, it is quite apparent that two of the important questions for the jury to determine were these: (1) Was the original attachment at an end when the accused took the goods from where they lay, outside of the house? (2) Did the officer at the bridge make a new attachment of them? And it is equally apparent from the question of the foreman that the jury were laboring with the second question. In answer to the foreman's question the court said: "If you are satisfied from the evidence that the sheriff attempted to take possession of these goods upon the wagon, and that he was interfered with, obstructed, or resisted by acts of the accused, then that would constitute a breach of the statute; but, if the sheriff did not at that time attempt to take the goods into his possession, then the acts of the accused would not constitute a breach of the statute." Under the circumstances, we think this was not a sufficient answer to the question, and was liable to mislead the jury in an important point in the case.

The facts in evidence tended to show that the officer claimed the goods as his under the original attachment, and not under an attachment which he had then made or had attempted to make. What he said to the accused was that the goods were already under attachment and that for that reason the accused must return them to him under penalty of arrest, and he said nothing about attaching them anew. From the foreman's question, it is evident that the jury wanted to know, in case that they found that the original attachment was at an end, whether what the officer said and did near the bridge, about which there seems to have been little or no dispute, "constituted another at-

tachment, or a renewal of the first attachment." If the facts as they appear of record as to what the officer said and did near the bridge were substantially undisputed at the trial, the court should have told the jury that they did not constitute another attachment, nor a renewal of the first attachment; and, if these facts were in dispute, then the court should have instructed the jury as to what acts would constitute a new attachment. If the jury found, as upon the evidence they well might, that the first attachment was at an end, and that no second attachment was made, then, under the answer given to the foreman, if they also found that the officer "attempted to take possession" of the goods while on the wagon, and the accused obstructed him in so doing, their verdict should be, "Guilty." This was clearly wrong, and the court undoubtedly did not intend to so charge; for, if the first attachment was at an end, and no other was made, the accused was justified in doing what he did.

There is error, and a new trial is granted. The other judges concurred.

THE KING v. TIBBITS AND WINDUST.

(Court for Consideration of Crown Cases Reserved, 1901. [1902] 1 King's Bench Division, 77.)

Lord ALVERSTONE, C. J.[3] This was a case reserved by Kennedy, J., at the last Summer Assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The indictments contained sixteen counts, upon each of which the defendants were found guilty. The charges contained in the indictment related to the publication of certain matters in a newspaper called the Weekly Dispatch, between January 13, 1901, and March 4, 1901 (inclusive), and particularly to the issues of that newspaper dated respectively January 13 and February 3, 1901. Prior to the publication of the first article, two persons, named Allport and Chappell, had been charged before the magistrate with offences under the Prevention of Cruelty to Children Act, 1894. Further charges of attempting to murder, and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy to commit the offence against section 1 of the Prevention of Cruelty to Children Act, 1894, were preferred against them. On February 8 Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on February 20. Their trial on the indictment for the attempt to murder commenced before Day, J., on March 1, and terminated on March 5. They were found guilty, and sentenced, Allport to fifteen years' penal servitude and Chappell to five years' penal servitude. The publications

[3] The statement of facts and part of the opinion are omitted.

in the Weekly Dispatch, which formed the subject of the present indictment against Tibbits and Windust, were statements relating to the case of Allport and Chappell, contained in the issues of the Weekly Dispatch during the hearing of the case against Allport and Chappell before the magistrate, and before and during the trial of these persons at the assizes. It is unnecessary to refer in detail to any of the incriminated articles, of which those of January 13 and February 3 were the most important. It is sufficient to say that the publication went far beyond any fair and bona fide report of the proceedings before the magistrate. They contained, couched in a florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Many of these statements related to matters as to which evidence could not have been admissible against them in any event, and purported to be the result of investigations made by the "Special Crime Investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants on all the counts of the indictment.

Upon the argument before us we had no doubt upon the main questions which had been discussed, but, having regard to the nature of the proceedings and the importance of the case, we thought it desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of those points until we have dealt with the main questions of law raised on behalf of both prisoners. It was not attempted to be argued by Mr. Foote, who appeared as counsel for both defendants, that the publication of such articles was lawful, and that the persons publishing such articles could not be punished. On the contrary, he contended that the publication of such articles was a contempt of Court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further urged that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles, that they were calculated to pervert or interfere with the course of justice, was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted. That the publication of such articles constituted a contempt of Court and could be punished as such, is well established. One of the sorts of contempt enumerated by Hardwicke, L. C., in the year 1742 is prejudicing mankind against persons before the case was heard, and he adds these important words: "There cannot be anything of greater consequence than to keep the realms of justice clear and pure that parties may proceed with safety both to themselves and their characters." The case of Rex v. Jolliffe shews that a criminal information lay for distributing in the assize town, before the trial at Nisi Prius,

handbills reflecting on the conduct of a prosecutor, and, in the course of his judgment in that case, Lord Kenyon made the following very relevant observations: "Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but that is a minor offence, when compared with that of publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But, if an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And, therefore, I cannot forbear saying, that, if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity." Again, in the case of Rex v. Fisher, the printer, publisher, and editor were convicted for publishing a scandalous, defamatory, and malicious libel, intending to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial, "and to injure and prejudice him in the minds of the liege subjects of our lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the due administration of justice and to deprive the said Richard Stephenson of the benefit of an impartial trial." It was urged on behalf of the defendants that this was an indictment for libel, and that, therefore, it was no authority for the indictment in the present case. But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and we cannot doubt that, if the attempt so to do be made, or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed, whatever the means adopted, provided there be not some legal justification for the course pursued. * * *

We think that the facts, which bring the incriminated articles within the category of misdemeanor, abundantly appear upon the face of each count, and that, under those circumstances, it is perfectly immaterial whether the articles be described and charged as libels or contempts or not. With reference to the argument, which was strongly urged, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It

would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see Reg. v. Grant, (1). We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these, justifies their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a Court of Justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him, the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence. * * *

Conviction affirmed.

II. Prison Breach [3]

STATE v. DOUD.

(Supreme Court of Connecticut, 1829. 7 Conn. 384.)

PETERS, J.[4] By the common law, all immoral acts, which tend to the prejudice of the community, are offences, and punishable by courts of justice. They are denominated crimes and misdemeanors. The former comprehend the more aggravated offences, which are nearly allied and equal in guilt to felony, whereof the superior court formerly assumed jurisdiction; the latter, inferior offences, whereof the superior and inferior courts have occasionally taken cognizance. But now, by statute, the Superior Court alone has jurisdiction of all offences at common law. Stat. 29, Ed. 1784; 172, Ed. 1821; 191, Sess. 1828; Knowles v. State, 3 Day, 103; 2 Swift's Syst. 366; Swift's Dig. 257; State v. Howard, 1 Com. Rep. 475; Rex v. Higgins, 2 East, 5.

By the ancient common law, prison breaches were felonies, if the party were lawfully imprisoned, for any cause whatever, whether civil or criminal, and whether he were actually within the walls of a prison, or in the stocks, or in the custody of a person who had lawfully arrested him. 2 Hawk. P. C. c. 18, s. i. And it hath been holden, by all the judges of the King's Bench, that though a prisoner departs from prison, with the keeper's license, it is an offence punishable as well in the prisoner as in the keeper. Hobart and Stroud's Case, Cro. Car. 209. The same doctrine is laid down by Sir William Blackstone, 4 Com. 129; and it is sanctioned by the late Ch. J. Swift, 2 Sw. Dig. 325. The escape of a person lawfully arrested, by eluding the vigilance of his keepers, before he is put in hold or in prison, is an offence against public justice; and the party himself is punishable by fine and imprisonment. For however strong and natural desire of liberty may be, yet every man is bound to submit himself to the restraints of the law. 2 Sw. Dig. 325; 4 Bla. Com. 129.

I am, therefore, of opinion, that the information is sufficient; and as the prisoner is not charged with breaking the prison, or any other actual violence, in effecting his escape, I advise, that he be subjected to the usual common law punishment, fine and imprisonment, one or

[3] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 137–139.

[4] The statement of facts is omitted.

both, at the discretion of the Superior Court, not exceeding the punishment from which he escaped.

The other Judges were of the same opinion, Williams, J., intimating some doubts.

Information sufficient.

III. Bribery [6]

STATE v. ELLIS.

(Supreme Court of New Jersey, 1868. 33 N. J. Law, 102, 97 Am. Dec. 707.)

DALRIMPLE, J. The indictment in this case was removed into this court by certiorari to the sessions of Hudson. It sets forth in substance, in language sufficiently plain and intelligible, that application having been duly made to the common council of Jersey City for leave to lay a railroad track along one of the public streets of that city, the defendant wickedly and corruptly offered to one of the members of said common council the sum of fifty dollars to vote in favor of said application. Upon return of the certiorari, a motion was made to quash the indictment, on the ground that the facts set forth do not constitute a crime.

It is said that the common law offence of bribery can only be predicated of a reward given to a judge or other official concerned in the administration of justice. The earlier text writers thus define the offence: "Where any man in judicial place takes any fee or pension, robe or livery, gift, reward or brocage, of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and drink, and that of small value." 3 Inst. 145. The definition in 4 Blackstone's Com. 139, is to the same effect. Hawkins, in his Pleas of the Crown, vol. 1, p. 312, gives, substantially, the same description of the offence, but adds: "Also, bribery signifies the taking or giving of a reward for offices of a public nature." The later commentators, supported, as I think, by the adjudged cases, however, maintain the broader doctrine, that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration, is an indictable common law misdemeanor. 3 Greenleaf's Ev. par. 71; Bishop on Criminal Law, vol. 1, par. 95, and notes; 1 Russell on Crimes, 156.

The case of Rex v. Vaughan, 4 Burr. 2494, arose upon motion for an information for a misdemeanor against the defendant for offering

[6] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 144.

money to the Duke of Grafton, First Lord of the Treasury, to procure the defendant's appointment by the Crown to an office. Lord Mansfield, in his opinion in that case, says: "If these transactions are believed to be frequent, it is time to put a stop to them. A minister, trusted by the king to recommend fit persons to offices, would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation." The motion was granted. In the case of Rex v. Plympton, 2 Lord Raymond, 1377, the court held that it was an offence to bribe persons to vote at election of members of a corporation. Many other cases might be cited in support of the general proposition laid down by the later text writers above referred to. The cases will, however, all be found collated in 2d Bishop's Criminal Law, in the notes to par. 76 and 77. Indeed, the authorities seem to be all one way. Neither upon principle nor authority can the crime of bribery be confined to acts done to corrupt officers concerned in the administration of justice. If in the case now before us, it was no crime for the defendant to offer, it would have been no crime for the councilman to accept the bribe. The result would, therefore, be that votes of members of council on all questions coming before them, could be bought and sold like merchandise in the market. The law is otherwise. The common law offence of bribery is indictable and punishable in this State. Our statutes against bribery merely define and fix the punishment for the offence, in cases of bribery of judicial officers and members of the legislature; they do not repeal or abrogate, or otherwise alter the common law.

It is contended, in the next place, that the facts set forth in the indictment constitute no offence, inasmuch as the common council had not jurisdiction to grant the application for which the vote was sought to be bought. In my opinion, it is entirely immaterial whether council had or had not jurisdiction over the subject matter of the application. If the application was, in point of fact, made, an attempt to procure votes for it by bribery was criminal. The offence is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote, if procured, would have produced the desired result, nor that the official, or the body of which he was a member, had authority by law to do the thing sought to be accomplished. Suppose an application made to a justice of the peace, in the court for the trial of small causes, for a summons in case of replevin, for slander, assault and battery, or trespass, wherein title to lands is involved: over these actions a justice of the peace has no jurisdiction, and any judgment he might render therein, would be coram non judice and void; yet, I think, it can hardly be contended, that a justice thus applied to may be offered, and with impunity accept a reward, to issue a summons in any case without his jurisdiction. If the common council of Jersey City had not authority to grant the application referred to, the act of the defendant in endeavoring to procure

the grant asked for was only the more criminal, because he sought by the corrupt use of money, to purchase from council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them. The gist of the offence is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. 2 Bishop's Criminal Law, par. 96. Would it not be a plain perversion of justice, to buy the votes of councilmen in favor of a surrender of the streets of the city, for the purposes of a railroad, when such surrender is unauthorized by law? The rights of the citizens of the municipality thus corruptly tampered with and bargained away, might be regained after a long and expensive litigation, or in some other mode; nevertheless, bribery and corruption would have done, to some extent at least, their work, and the due course of justice have been disturbed. But I am not prepared to assent, as at present advised, to the proposition that the common council could not properly entertain the application. They were asked by a chartered railroad company of this State, having its terminus in Jersey City, to consent that a railroad track might be laid along one of the public streets of that city. It is not pretended that any legislative authority to lay such track had been obtained. The railroad company could not, under these circumstances, lawfully appropriate to its use one of the public streets of the city without the consent of the city, which has full control over all public streets within the city limits. Laws 1851, p. 406, § 42, par. 6.

Whether or not the common council has the power, with or without legislative sanction, to grant the use of a public street to a railroad company for the uses of the railroad, it is, I think, clear that no such use can be made of the streets, without the consent of the city, in the absence of a legislative grant to that effect.

Nor is it material whether the railroad company which applied for the privilege, had the power under its charter to lay the track. Application had been duly made for that purpose, and was pending. An attempt to bribe a member of council to vote upon it, whether such attempt was made after or before the introduction of an ordinance or resolution granting the privilege asked, comes within the general law against bribery. Whether the common council had authority to make the grant, or the railroad company the power to avail itself of its benefits, if made, or whether the offer of a bribe was before or after the application in due course of proceeding, had been embodied in an ordinance or resolution, is immaterial. The offer of anything of value in corrupt payment or reward for any official act, legislative, executive, or judicial, to be done, is an indictable offence at the common law.

The objections taken are not tenable, and the motion to quash must be denied.

Motion denied.

OFFENSES AGAINST PUBLIC PEACE

I. Riot[1]

STATE v. BRAZIL et al.

(Court of Appeals of South Carolina, 1839. Rice, 257.)

The report of his honor the presiding judge, of these cases, is as follows: "These were three indictments for riot. The first ground in the notice applies to all the cases. It was satisfactorily proved, that on three nights in the month of August, a band of men, eight or ten, disguised, paraded through the streets of Winnsborough, armed with guns or pistols, or both; they marched backwards and forwards, shooting guns or pistols and blowing horns, from 9 o'clock p. m., until after midnight; that in several instances, persons, and especially females, were aroused from their sleep in a state of terror and alarm, by the firing of the guns in the streets, near to their houses. * * *

The defendants now moved in arrest of judgment, and for a new trial, on the following grounds: For a new trial—1. Because from the facts established by the evidence, the offence in law, is not a riot, and the court should have so charged the jury. * * *

CURIA, per EVANS, J.[2] * * * But do the facts proved amount to a riot? Hawkins says a riot is a tumultuous disturbance of the peace by three persons or more, assembled of their own authority, with intent, mutually, to assist each other, and afterwards putting the design in execution in a terrific and violent manner, whether the object be lawful or unlawful. This partakes of the imperfections of all definitions, and a correct idea of the offence is only to be obtained by analysing the cases which have been decided. All the authorities agree that if the act committed be a trespass, it is unlawful and riotous, as if the object be to beat another, or to pull down his house, or such like acts. But a man may lawfully pull down his own house in a tumultuous manner and with a great concourse of people, yet if it be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot—so also if a dozen men assemble together in a forest and blow horns, or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight, in the streets of Charleston, or Columbia, and were to march through the streets crying fire, blowing horns and shooting

[1] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 152.

[2] The statement of facts is abridged and part of the opinion is omitted.

guns, few, I apprehend, would hesitate in pronouncing it a riot, although there might be no ordinance of the city for punishing such conduct. And why? Because such conduct in such a place is calculated to excite terror and alarm among the citizens. Lord Holt says, 10 Mod. 116, if a number of men assemble with arms, in terrorem populi, although no act be done, it is a riot. On the same principle, an indictment was sustained for riotously kicking a foot ball in the town of Kingston, 2 Chitty, Cr. 494. It was an amusement, but accompanied with such circumstances of noise and tumult, as were calculated to excite terror and alarm among the inhabitants of the town. Parker, Ch. J., says in Runnel's Case, 10 Mass. 518, 6 Am. Dec. 148, "if the offence consists in going about armed, without committing any act, the words 'in terrorem populi,' are necessary—because the offence consists in terrifying the people. For the same reason, it is said in the case of the rioters at Covent Garden Theatre, 2 Camp. 358, that the audience may lawfully express their approbation or disapprobation of an actor; yet if a number of persons go there with intent to render the performance inaudible, though they offer no violence to the house, or any person there, they are guilty of a riot. These authorities, I think, fully sustain the position, that even admitting the acts the defendants performed were not in themselves unlawful, yet they were calculated and intended to excite terror and alarm, and in two of the cases were actually proved to have produced that effect. And in confirmation of this conclusion, it is stated in a note to Russell on Crimes, vol. 1, p. 247, to have been decided in Pennsylvania, in the case of Cribs and others, reported in Add. 277, "If a number of persons assemble in a town in the dead of night, and by noises or otherwise, disturb the peaceable citizens, it is a riot." * * *

The motion is dismissed on all the grounds.

O'NEALL, EARLE, BUTLER and RICHARDSON, Justices, concurred.

II. Affray[a]

SIMPSON v. STATE.

(Supreme Court of Tennessee, 1833. 5 Yerg. 356.)

At the May term of the circuit court for the county of White, an indictment was found against the plaintiff in error, in substance as follows: The grand jurors for the State, &c., upon their oath, present that William Simpson, with force and arms, being arrayed in a warlike

[a] For a discussion of principles, see Clark on Criminal Law (3d Ed.) § 153.

manner, in a certain public street and highway situate, unlawfully, and to the great terror and disturbance of divers good citizens of the said State, then and there being, an affray did make, in contempt of the laws of the land, to the evil example of all others in the like case offending, and against the peace and dignity of the State. To this indictment the plaintiff in error pleaded not guilty; upon which issue was joined, and the cause submitted to a jury, who found him guilty in manner and form as charged in the indictment. The plaintiff in error moved in arrest of judgment, and filed his reasons, which upon argument was overruled by the court, and a bill of exceptions taken thereto. From this judgment, an appeal in error is taken to this court.

WHYTE, J.[4] On the argument in this case, it is contended by the counsel for the plaintiff in error, that the record does not present any charge that is known to the law, as cognizable in our courts by indictment. On the part of the State, the attorney general contends, that the offence of an affray is sufficiently charged in and by the indictment. Authorities have been cited on this question; and books of forms of indictments for affrays, have also been referred to, for the purpose of showing that the form of the charge in the present indictment is a valid one for the offence of an affray; which will now be noticed. Blackstone, in the fourth volume of his Commentaries, page 145, says, affrays, from affrater, to terrify, are the fighting of two or more persons, in some public place, to the terror of his majesty's subjects; for if the fighting be in private it is no affray, but an assault. It will be observed, that according to this definition of an affray by Blackstone, three things are necessary to constitute it. First: There must be fighting. Second: This fighting must be by or between two or more persons. And, Third: It must be in some public place to cause terror to the people. Hence it must follow, that if either of these requisites are wanting, an affray does not exist. In the charge in this indictment, which is assumed to amount to an affray by its constitution, the two first of the above requisites are wanting, to wit, fighting, or actual violence, and the number of persons necessary for the constitution of it. To obviate this, and to prove that these particulars are not essential, Serjeant Hawkins is cited and relied upon, (book, 1, ch. 28, § 4;) where he says, "but granting that no bare words in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." * * * The true construction of the portion of the fourth section above cited, is giving it

[4] Part of the opinion of Whyte J., and the dissenting opinion of Peck, J., are omitted.

an application to particular persons in particular places, under particular circumstances; this is proved by what Serjeant Hawkins has laid down previously in the first and second sections of the same chapter, under the same head, where he gives the general rule, concurring in substance with Blackstone; he says: "From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray, as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people; and for this cause, such private assault seems not to be inquirable in a court, but as all affrays certainly are, as being common nuisances." This passage concurs with and supports Blackstone in the above two particulars of actual violence, and the plurality of the persons concerned as actors, which it was assumed the citation from this fourth section dispensed with. The like deduction may be drawn from the second section, where it is laid down, "that no quarrelsome or threatening words whatsoever, shall amount to an affray, and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows." * * *

Here, in this record, it is not stated that the plaintiff in error fought with any person, or committed any act of violence on any one, setting forth its nature, or that he inflicted blows on any person, with the attendant manner and circumstances, and also in each case naming the person or persons, if known, and if not known, stating that fact; all of which ought to appear in the charge, if they existed. As they do not so appear, their existence is not to be intended. There is, therefore, error in the judgment of the circuit court, which must be reversed; and this court proceeding to give such judgment as the circuit court should have given, direct the indictment to be quashed for its insufficiency.

CATRON, C. J., and GREEN, J., concurred. PECK, J., dissentiente.

Judgment reversed.

III. Forcible Entry and Detainer[5]

HARDING'S CASE.

(Supreme Judicial Court of Maine, 1820. 1 Me. [1 Greenl.] 22.)

The defendant was indicted for that he, "with force and arms, to wit, with an axe and auger, unlawfully, violently, forcibly, injuriously and with a strong hand, did enter into the dwelling-house of Joseph Cate in said Portland, and in his actual and exclusive possession and occupation with his family; and the said Harding did then and there unlawfully, violently, forcibly, injuriously and with a strong hand, bore into said dwelling-house with said auger, and cut away a part of said house, and stove in the doors and windows thereof with said axe, said Joseph's wife and children being in said house, thereby putting them in fear of their lives," &c.

A verdict of conviction being found against the defendant, he moved that judgment be arrested for the following reasons:

1. That the allegations contained in said indictment do not amount to any criminal offence, either at common law, or by statute.

2. That the indictment contains no allegation that Joseph Cate was seized of the said dwelling-house, or of the land whereon the same stands, at the time of the alleged forcible entry; nor does it allege who was seized of the same; neither does it appear but that Harding was himself seized of the freehold. * * *

PREBLE, J.,[6] at another day in the term, delivered the judgment of the Court, as follows: * * *

The indictment is at common law. If the facts charged, therefore, do not constitute an indictable offence at common law, no sentence can be pronounced upon the defendant.

The earlier authorities do sanction the doctrine, that at common law, if a man had a right of entry in him, he was permitted to enter with force and arms, where such force was necessary to regain his possession. (Hawk. P. C. chap. 64, and the authorities there cited.) To remedy the evils arising from this supposed defect in the common law, it was provided by Stat. 5 Rich. 2, chap. 7, that "none should make any entry into any lands or tenements, but in cases where entry is given by the law; and in such cases, not with strong hand nor with multitude of people but only in a peaceable and easy manner." The authorities are numerous to show that for a trespass,—a mere

[5] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 154, 155.

[6] The statement of facts is abridged and part of the opinion is omitted.

civil injury, unaccompanied with actual force or violence, though alleged to have been committed with force and arms,—an indictment will not lie. But in Rex v. Bathurst, Sayers' Rep. 226, the Court held that forcible entry into a man's dwelling-house was an indictable offence at common law, though the force was alleged only in the formal words vi et armis. In Rex v. Bake, 3 Burr. 1731, it was held that for a forcible entry an indictment will lie at common law; but actual force must appear on the face of the indictment, and is not to be implied from the allegation, that the act was done vi et armis. In the King v. Wilson, 8 D. & E. 357, an indictment at common law charging the defendant with having unlawfully and with a strong hand entered the prosecutor's mill, and expelled him from the possession, was held good. In this latter case Lord Kenyon remarks: "God forbid these facts, if proved, should not be an indictable offence; the peace of the whole country would be endangered, if it were not so." The case at bar is a much stronger one, than either of those cited. The peace of the State would indeed be jeopardized, if any lawless individual, destitute of property, might, without being liable to be indicted and punished, unlawfully, violently, and with a strong hand, armed with an axe and auger, forcibly enter a man's dwelling-house, then in his actual, exclusive possession and occupancy with his wife and children, stave in the doors and windows, cutting and destroying, and putting the women and children in fear of their lives.

The second objection that no seizin is alleged does not apply to indictments for forcible entries at common law. Under the statute of New York against forcible entry, the party aggrieved has restitution and damages; and hence it is necessary that the indictment should state the interest of the prosecutor. The People v. Shaw, cited by the defendant's counsel, and the People v. King, 2 Caines (N. Y.) 98, are cases upon the statute of that State. In Rex v. Bake, Mr. Justice Wilmot remarks: "No doubt an indictment will lie at common law for a forcible entry though they are generally brought on the acts of parliament. On the acts of parliament it is necessary to state the nature of the estate, because there must be restitution, but they may be brought at common law." In the King v. Wilson, Lord Kenyon says: "No doubt the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party grieved, restitution and damages; and therefore in an indictment on the statutes, it is necessary to state the interest of the prosecutor." Our statute contains no such provision, and gives no remedy by indictment. It simply provides process to obtain restitution, leaving the parties, the one to his action for damages, the other to his liability to be indicted and punished at common law. * * *

On the whole we think the indictment contains sufficient matter to warrant a judgment upon the verdict which has been found against the defendant; and the motion in arrest is accordingly overruled.

IV. Libels[7]

COMMONWEALTH v. BLANDING.

(Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 304, 15 Am. Dec. 214.)

PARKER, C. J.,[8] delivered the opinion of the court. * * *

As to that part of the instructions of the judge which states that the malicious intent charged in the indictment (there being no evidence admitted to prove the truth of the facts alleged) was an inference of law, this is certainly the common-law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this court. * * *

The propagator of written or printed tales to the essential prejudice of any one in his estate or reputation is a public offender, and is not allowed to excuse himself by the additional wrong of proving in a court of justice, in a collateral way, the facts which he has unwarrantably promulgated.

And yet there are some exceptions to this general rule, recognized by the common law, and others which are rendered necessary by the principles of our government.

These exceptions are all founded in a regard to certain public interests, which are of more importance than the character or tranquillity of any individual. All proceedings in legislative assemblies, whether by speech, written documents, or otherwise, are protected from scrutiny elsewhere than in those bodies themselves, because it is essential to the maintenance of public liberty that in such assemblies the tongue and the press should be wholly unshackled. So proceedings in courts of justice, in which the reputation of individuals may be involved, are to be free from future animadversions, because the investigation of right demands the utmost latitude of inquiry, and men ought not to be deterred from prosecuting or defending there by fear of punishment or damages. Yet in these instances, if this necessary indulgence is abused for malicious purposes, a pretense only being made of the forms of legislative or judicial process, the party so conducting himself is amenable to the law. The right, also, of complaining to any public constituted body of the malversation or oppressive conduct of any of its officers or agents, with a view to redress for actual wrong or the removal of an unfaithful officer, may

[7] For a discussion of principles, see Clark on Criminal Law (3d Ed.) §§ 156, 157.

[8] The statement of facts and part of the opinion are omitted.

be justified, because the case will show that the proceeding does not arise from malicious motives, or, if it does, because the common interest requires that such representations should be free. And there are cases of mere private import, such as an honest, though mistaken, character of a servant, which, when requested by any one having an interest, the law considers innocent. These cases are all provided for by the common law, and they go far to render harmless that much decried rule that the truth is no defense in a prosecution for libel. Rex v. Wright, 8 T. R. 293; Rex v. Creevey, 1 M. & S. 273; Lake v. King, 1 Saund. 131; Astley v. Younge, 2 Burr. 807; Rogers v. Clifton, 3 B. & P. 587; Esp. Dig. (3d Ed.) 505; Thorn v. Blanchard, 5 Johns. (N. Y.) 508; Rex v. Fisher, 2 Campb. 563; Starkie on Slander, c. 11. * * *

But there are certain other cases, not yet distinctly adjudicated upon, where the truth of charges is a legitimate ground of defense, by clear inference from principles recognized by the common law and our own tribunals.

In Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212, it is stated "that a man may apply by complaint to the Legislature to remove an unworthy officer, and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel." This is put for illustration of the principle, not to exhibit the only instance in which it is to be applied. A complaint to the executive against an officer holding his place at its pleasure, to a court against an officer whom they have the power to dismiss, to any body of men having power over its officers, the subject of the complaint being of a public nature, or the person complaining having a particular interest in it, falls within the same principle.

Thus, if a minister of the gospel should be guilty of gross immoralities, and one of his parish should complain to the church in order that an inquiry might be instituted, or if a candidate for the ministry should from vicious habits be unfit for the station he seeks, since all are interested in the purity of the ministerial character, information to those whose duty it is to determine his qualifications would not be libelous, if communicated in a spirit of truth and candor. Various other cases might be put, in which, if it appeared that the purpose was sincere and upright and wholly free from malice, the truth of the facts stated would be a good defense. But in all such cases the information is to be given to those who have a right to act upon it, and whose interest and duty are concerned in it; for a promiscuous promulgation of the same facts would of itself be the strongest evidence of malice, and in such cases the court must judge whether the occasion is a fit and proper one for the admission of such defense, and the jury must determine the motives and the end. * * *

Having thus attempted to vindicate the law of libel, as established in this commonwealth, from the aspersions which are frequently cast upon it, we will consider its application to the case before us, in order to determine whether, upon either of the grounds assumed, a new trial ought to be granted. * * *

The other objection, which opens the general question, is that the judge refused to admit in evidence the inquisition which is alluded to in the publication, and with a view to prove the truth of the facts therein stated. Had the inquisition been published without any defamatory comment, it certainly would not have furnished ground for this prosecution; for it does not of itself contain any libelous matter, and it is in the nature of a judicial inquiry, the publication of which would not be criminal, unaccompanied by direct proof of malice. The inquisition merely states that a deceased stranger, who was found dead in a tavern kept by Fowler, came to his death by intoxication. Now, this may be true without any implication against Fowler; for every innholder is liable to have drunken people come to his house, and, if they die there, he may be entirely innocent of the cause of their death. But the remarks made by the defendant charged Fowler with having administered the liquid poison, and thus being the cause of the death of the stranger; and the public are warned against resorting to the house where such practice is allowed, and the municipal authorities are invoked to exert their power by taking away or withholding the license of Fowler to keep a public house. The matter of this publication is certainly libelous, as it insinuates gross misconduct against Fowler, and directly charges him with a violation of his duty, and exposes him to the loss of his livelihood, so far as that depends upon the reputation of his inn for regularity and order. Admitting the account of the inquisition to be correct as published, yet the addition of comments and insinuations tending to asperse Fowler's character renders it libelous. Thomas v. Croswell, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269.

But it is said that this is a matter of public concern, and that the defendant was impelled by a sense of public duty to warn travelers and others from a house which was thus deservedly stigmatized. The answer is that the defendant did not select a proper vehicle for the communication. The natural effect of a publication of this sort in a newspaper is to procure a condemnation in the public mind of the party accused, and his punishment, by bringing his house into disrepute, without any opportunity of defense on his part, so that the accuser becomes judge and executioner at one stroke, and his purpose if a malicious one, is answered without any means of relief; for the mischief to the person libeled would be quite as great if he were innocent as if he were guilty. If it should be said in answer that all this is right if the allegation be true, and if not true he may recover his damages in an action of slander, it may justly be replied that this

remedy is uncertain and incomplete; for in many cases the slanderer will be unable to respond in damages, and the suffering party will be subjected to the additional injury of a troublesome and expensive lawsuit, with little or no hope of recompense.

There may be cases where (there being no other mode by which great mischief can be warded off from the public) a newspaper communication, made with the sole view of preserving the citizens from injury to their life or health, would be justifiable. Such might be the case of an apothecary selling and distributing poison in the form of medicine, stated by a distinguished member of the late convention for revising the Constitution. This is an extreme case, where to delay information until the forms of law should be pursued might endanger the lives of hundreds, and such a case would be a law to itself; the public safety being the supreme law, and it being every citizen's duty to give warning in such cases. There may be cases of gross swindling, where nothing but immediate notice would secure the public against depredation, which would be governed by the same principle.

But in the case before us there was no such urgent necessity. The statute regulating licensed houses provides the restrictions and the punishment which the Legislature has thought adequate to the offenses of the nature contained in this libel. For suffering excessive drinking in his house, the innkeeper is subject to a penalty. For a second offense, he is to be put under bond for good behavior, in addition to a pecuniary mulct. For a third, he is to forfeit his license and shall be disqualified to keep a public house for two years. And, besides all this, if his misconduct is continued so as to constitute his house disorderly, or so that he violates the law for regulating it, he forfeits the penalty of his recognizance. Other guards and securities are provided in the statute to prevent the abuse of the license, and a complaint may be made to the selectmen, to a justice of the peace, or to a grand jury, by any person who has knowledge of such offenses, without incurring the risk of a prosecution for libel. There was, then, no necessity for this newspaper publication, and the defendant, by resorting to it, has taken the law into his own hands unwarrantably, instead of resorting to those tribunals which the laws have constituted for the correction of these offenses. This, then, is a case in which the defendant cannot be allowed to excuse himself by showing the truth of the accusation which he has unjustifiably made. He had no right to arraign the prosecutor before the public in the form which he adopted, and thus destroy the reputation of his house, without leaving him any means of showing his innocence of the charges made against him. The occasion was not a proper one for a newspaper denunciation.

Motion for a new trial overruled.

JURISDICTION

STATE v. CUTSHALL.

(Supreme Court of North Carolina, 1892. 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.)

AVERY, J.[1] The statute (Code, § 988) provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every other person counseling, aiding, or abetting such offender, shall be guilty of a felony, and imprisoned in the penitentiary or county jail for any term not less than four months, nor more than ten years, and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody as if the offense had been actually committed in that county."

The general rule is that the laws of a country "do not take effect beyond its territorial limits, because it has neither the interest nor the power to enforce its will," and no man suffers criminally for acts done outside of its confines. 1 Bish. Crim. Law (7th Ed.) §§ 109, 110; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 335; State v. Barnett, 83 N. C. 616; State v. Brown, 2 N. C. 100, 1 Am. Dec. 548.

In the case of State v. Ross, 76 N. C. 242, 22 Am. Rep. 678, the court said: "Our laws have no extraterritorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that state"—thus recognizing the principle, generally accepted in America, that a state will take cognizance, as a rule, only of offenses committed within its boundaries.

Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act, which takes effect in our own state; as where one who is abroad obtains goods by false pretenses, or circulates libels in our own state, and contrary to our laws, or from a standpoint beyond the line of our state fires a gun or sets in motion any force that inflicts an injury within the state for which a criminal indictment will lie. 1 Bish. Crim. Law, § 110; Ham v. State, 4 Tex. App. 659; Cambioso v. Maffet, 2 Wash. C. C. 98, Fed. Cas. No. 2,330.

[1] The statement of facts and part of the opinion is omitted.

Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when, under the provisions of extradition laws or the terms of treaties, they are allowed to be brought into its limits to answer such charges. * * * So a foreigner, not accredited to another government as a representative of his own nation, is subject to the law of the country in which he may travel or establish a temporary domicile, and may be tried in its tribunals for any violation of its criminal laws while within its territorial limits.

Wheaton, in his treatise on International Law (section 120, note 77), says: "In Great Britain, France, and the United States, the general principle is to regard crimes as of territorial jurisdiction. * * * The question whether a state shall punish a foreigner for a crime previously committed abroad against that state or its subjects also depends upon its system respecting punishing generally for crimes committed abroad; Great Britain and the United States respecting strictly the principle of the territoriality of crime." While, in our external relations with other nations, our federal head, the United States, is the only sovereign, for the purpose of internal government such portion of the sovereign power as has not been surrendered to the general government is retained by the states. 11 Am. & Eng. Enc. Law, p. 440, and notes.

In the exercise of their reserved powers, especially in the execution of the criminal law, questions arise which are settled and determined either according to the principles of international law or by analogy to them. It is contended that nothing but comity between nations, in the absence of express provisions of treaties, prevents one nationality from making laws to punish persons who commit criminal offenses in another country, and afterwards come within its territory; and that, admitting this principle to be correct, there can be no treaty stipulation, and there is in fact no constitutional inhibition, that restricts the Legislature of one of our internal sovereignties from enacting laws to punish a person who comes into its domain, so as to be apprehended there, for a crime committed in a sister state.

Article 29 of the confirmatory charter granted by Henry III. provided that "no freeman should be taken or imprisoned, or disseised of freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him, but by lawful judgment of his peers or by the law of the land."

In the formal declaration of independence the king of Great Britain, after being charged with many violations of fundamental principles and invasions of common rights, was arraigned before the world "for depriving us in many cases of trial by jury; for transporting us beyond the seas to be tried for pretended offenses." This language evinces the purpose of our representatives to risk their lives and their fortunes, in part, at least, to secure, not simply the ancient right of

trial by jury, but trial by a jury of the vicinage, within easy reach of all evidence material for the vindication of the accused, where the charge might prove unfounded upon a fair investigation.

During the same year these principles were embodied in the declaration of rights by the colonial congress, in what now constitute sections 13 and 17 of article 1 of the Constitution, which are as follows:

"Sec. 13. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men."

"Sec. 17. No person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."

Not only has section 13 been construed to guaranty to every person (whether a citizen of this state or of another commonwealth) a trial by jury in all cases, which were so triable at common law (such as an indictment for a felony), but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to remove the case to some neighboring county, in order to secure a fair trial. Judge Cooley says (Const. Lim. marg. pp. 319, 320): "Many of the incidents of a common-law trial by a jury are essential elements of right. The jury must be indifferent between the prisoner and the commonwealth, and to secure impartiality challenges are allowed, both for cause, and also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." Kirk v. State, 1 Cold. (Tenn.) 344; Armstrong v. State, Id. 338; State v. Denton, 6 Cold. (Tenn.) 539. This strong language is used in commenting upon the clause, which, in substantially the same terms, guaranties the right of trial by jury in all serious criminal prosecutions in every one of the states. * * *

After the federal Constitution had been ratified the people of the states, with the recollection of the flagrant invasions of their rights by transporting freemen abroad to be tried for "pretended offenses" still fresh, amended it so that, says Ordronaux, "the crime and its punishment are attached to the jurisdiction within which it was committed." Ordronaux, Const. Leg. 259; Const. U. S. art. 3, § 2, cl. 3. These amendments apply only to federal tribunals, but the fact that they were prohibited from trying, except in the state where the crime should be committed, is evidence of a purpose to put it beyond the power of congress to have a citizen tried for a criminal offense except by a jury of the vicinage, and at a point not so remote as to deprive him of the benefit of his witnesses.

Another amendment (article 4, § 2, cl. 2) supplements that already referred to, and shows by its terms that the purpose in enacting it was to definitely localize the forum of every crime committed by a person not in the land or naval forces, by providing for the extradition of criminals on demand of the governor "to the state having jurisdiction of the crime." It was evidently contemplated by the framers of the Constitution that ordinarily there would be but one state where a crime could be properly said to have been committed, and whose courts would have cognizance of it. It was natural that they should cling to the old territorial rule, which limited the jurisdiction to the courts of the county.

The state of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. If the defendant married a second time in South Carolina or elsewhere outside of North Carolina, the act had no tendency at the time to affect society here, nor can that unlawful conduct be punished as a violation of our criminal laws. On the other hand, the completed act of entering into a second marriage in a neighboring state is not analogous to the cases where a mortal wound is inflicted in one state, and the wounded man lingers and dies from its effects within the limits of another state during the next ensuing 12 months.

It is needless now to discuss the question whether, on account of the fact that the ultimate effect of the wound is the resulting death, the state in which the death occurs in such cases should not be held to have common-law jurisdiction to try for murder, since nearly all of the states have enacted statutes providing for such trials, and some of them have declared such enactments essential. Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; Bishop, Crim. Law, §§ 112–117. * * *

The attempt to evade the organic law by making the coming into this state (after committing an offense in another) a crime is too palpable, in view of the admitted fact that the Constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offenses against their own sovereignty, but especially because the trial for the new felony involves an investigation of the original bigamy by a jury not of the vicinage and remote from the witnesses. * * *

Our statute applies by its terms as well to a citizen of another state, who in transitu affords to our local authorities the opportunity to apprehend him, as to those who become domiciled within our borders. Ordronaux, Const. Leg. pp. 339–343. As a citizen of another state, he has the privilege of demanding a trial in a particular locality, and by a jury of the vicinage; and it would deprive him of that right, guaranteed by the federal Constitution, to arrest him while temporarily in this state, and, under the pretense of punishing him for the felony

of coming into the state after a bigamous marriage, try him remote from the locality where the marriage was celebrated and his witnesses reside for an offense involving only the question whether the second marriage was in fact bigamous. Ordronaux, supra, p. 255.

Wharton (2 Crim. Law, § 1685), after discussing the English statute, says: "In some of the United States a similar statute has been enacted; in others a continuance in the bigamous state is made indictable, no matter where the second marriage was solemnized. But, when the act of bigamous marriage is made the subject of indictment, then, at common law, the place of such act has exclusive jurisdiction." The court of Alabama has expressly held in Beggs v. State, 55 Ala. 108, that where a person is indicted for the bigamous act of marrying a second time in another state, as distinguished from continuing to cohabit within the state after such marriage, the indictment could not be sustained; but the court did not find it necessary in that case to discuss the question of legislative power, as the Legislature had modified the English statute in the same way that it had been altered by law in Vermont, Massachusetts, Tennessee, Missouri, and other states.

It will not be insisted that the courts of the state of Maine would have power to enforce a statute which provided for punishing with death any person who had committed murder in another state, and then gone within its limits, by apprehending a Texan, and requiring him to send to the banks of the Rio Grande for testimony to meet and refute that of a malignant neighbor who had followed him almost across the continent to wreak his vengeance. If a state has the power to punish one caught within its borders as a felon for a bigamous marriage committed within another state, what is to prevent the trial of a citizen found in a neighboring state for a homicide, if the statute were broad enough to include murder as well as bigamy? if the statute made it a felony punishable with death to come into the state after committing murder in another? The assertion of such authority would jeopardize the security of every American citizen who ventured beyond the confines of the state in which he resided. The express provision for the extradition of criminals excludes the idea of trying them outside of the limits of the state where the offense is committed, even if there were no direct guaranty that they should not be subject to arrest and trial for offenses against their own sovereign, when beyond her limits.

The additional counts in which it is charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina, and cohabited with the person to whom he was married, cannot be sustained, because that offense is not covered by our statute. The North Carolina statute would, if enforced, subject him to indictment if he should come across the border and leave the woman behind.

While we do not recognize the validity of marriages of parties when they leave the state for the purpose of evading a law which makes a marriage between them unlawful, and with the intent, after celebrating

the rites in another jurisdiction, to return and live in this state (State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683), we have no express statute making such acts indictable as a felony, but only as a misdemeanor, where they live in adultery here (State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599). This fact is fatal to another count of the indictment. But we do not wish to be understood as questioning the power of the state to punish one of its citizens who goes out of the state with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction, and returning to live within its borders.

For the reasons given we think that there was no error in the judgment of the court below quashing the indictment; and it is affirmed.

SIMPSON v. STATE.

(Supreme Court of Georgia, 1893. 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75.)

Indictment for assault to murder.

LUMPKIN, J.[1] * * * Under the evidence introduced in behalf of the state, and which the jury evidently believed to be true, the accused shot twice at the prosecutor, intending the balls from the pistol used to take effect upon him. At the time of the firing the prosecutor was in a boat upon the Savannah river, and within the state of Georgia, and the accused was standing upon the bank of the river in the state of South Carolina. It was conceded that if either or both of the balls had struck the prosecutor an offense of some kind would have been committed in Georgia, upon the idea that the act of the accused took effect in this state; but it was contended that, inasmuch as the prosecutor was not struck, no effect whatever was produced in Georgia by the act in question.

This contention is not well founded in point of fact, for the evidence shows conclusively that, although the prosecutor was not injured, the balls did strike the water of the river in close proximity to him, within this state, and therefore it is certain that they took effect in Georgia, although not the precise effect intended, assuming that the verdict correctly finds it was the deliberate purpose of the accused to actually shoot at the prosecutor. What the accused did was a criminal act, and it did take effect in this state. Mr. Bishop says: "The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense, against a state or county upon

[1] Part of the opinion is omitted.

whose soil he never set his foot." 1 Bish. Crim. Proc. § 53. And see Bish. Crim. Law, § 110.

Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook or other contrivance by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle.

Cases are numerous in which it has been held that where a person wounds another in one state or country, but the person wounded dies elsewhere, beyond its territorial boundaries, the courts of the state or country in which death occurred have jurisdiction to try the offense. A leading case on this line is that of Tyler v. People, 8 Mich. 320, in which there was a dissenting opinion by Justice Campbell. The ruling of the majority of the court, however, was approved in the case of Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89. Justice Gray, who delivered the opinion in the latter case, says, on page 7, that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction"; and the words quoted are followed by apt illustrations. On page 17 of the same report Justice Gray disapproves the dissenting opinion of Justice Campbell above mentioned.

There is, however, a clear distinction between cases like the one just cited, where a wound is inflicted in one jurisdiction and death ensues in another, and cases like the present, where the accused in one state puts in operation a force which takes effect in another. On page 343 of 8 Mich., supra, this distinction is clearly stated by Justice Campbell. He says the doctrine of constructive presence is not applicable to a case like that with which he was then dealing, and then uses the following language which sustains our ruling in the case at bar. Speaking of constructive presence, he says: "All that it amounts to is

that the crime shall be regarded as committed where the injurious act is done. A wounding must, of course, be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes directly operative." This doctrine is supported by Rorer on Interstate Law, 241, 243, 244, citing Johns v. State, 19 Ind. 421, 423, 81 Am. Dec. 408. And see Whart. Confl. Laws, § 825, and notes on pages 717, 718; Whart. Crim. Law, §§ 278–280.

In Adams v. People, 1 N. Y. 173, it appeared that the accused forged a paper in Ohio, upon which he procured money in New York, through an innocent agent, without going into the latter state. He afterwards voluntarily went into that state, and was indicted and tried for the crime. It was conceded by both court and counsel that he was guilty of committing the crime in the state of New York, and the question upon which the case turned was simply whether or not, inasmuch as he owed no allegiance to that state, he could be tried and punished therein. In U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, it appeared that a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, by which a person on a schooner belonging to the natives, and lying in the same harbor, was killed; and it was held that the act, in contemplation of law, was done on board the foreign schooner, where the shot took effect, and that jurisdiction of the crime belonged to the foreign government, and not to the courts of the United States.

In Hawes on Jurisdiction (section 110) it is laid down that "a crime may be committed within the jurisdiction of a state, although the person committing it never was within its borders, if the act takes effect there." An interesting discussion pertinent to the question involved may be found in 6 Crim. Law Mag., beginning on page 155, in an article entitled "Dynamiting and Extraterritorial Crime." "A party who, in one jurisdiction, or in one county, may put in operation a force that does harm in another, may be liable in either for the offense." Brown, Jur. § 92. This section also contains numerous illustrations which are apt and pertinent. See, also, Reg. v. Rogers, 14 Cox, Cr. Cas. 22.

The above authorities demonstrate beyond question that a criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter. In view of these authorities, there cannot in the present case be any doubt whatever that Simpson would have been indictable in Georgia if a ball from his pistol had actually wounded Sadler. That this would be true is too well established for serious controversy. The able and zealous counsel for the plaintiff in error candidly conceded that such would be the

law, but contended that, as the balls "took no effect in Georgia," the entire act of the accused was committed in South Carolina, and that he really did nothing in this state.

We have endeavored to show that this contention is not sound. As we have already stated, the act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It having been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind, in which the act of the accused, when analyzed, is simply an attempt to unlawfully wound another by shooting, no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful or not. The criminality was complete, and the offense was perpetrated in Georgia, irrespective of results. * * *

Judgment affirmed.

FORMER JEOPARDY

STATE v. SOMMERS.

(Supreme Court of Minnesota, 1895. 60 Minn. 90, 61 N. W. 907.)

MITCHELL, J.[1] To an indictment for grand larceny, the defendant pleaded in bar former jeopardy of punishment for the same offense. In brief, his plea was that at a former term of court he had been placed on trial on the same indictment, and that after the case had been submitted to the jury the court, without his consent, and in his absence,—he being at the time confined in prison,—discharged the jury without a verdict, on the alleged ground of their inability to agree. The court sustained a demurrer to this plea, and the correctness of this ruling is the only question presented by this appeal.

The provision of the constitution, which is but declaratory of the common law, is that "no person for the same offense shall be put twice in jeopardy of punishment." What constituted "jeopardy of punishment," in the legal or constitutional sense, and when it attaches, are questions upon which there is not entire harmony among the authorities. But, notwithstanding some dissenting views on the subject, we think it may be considered as settled by the great weight of authority, and in accordance with sound principle, that a person is put in jeopardy of punishment, in the legal sense, when a trial jury is impaneled and sworn to try his case, upon a valid indictment, or, as it was expressed at common law, "when the jury is charged with the defendant." After a jury is thus charged with a prisoner, he is entitled to have the trial proceed to a finish by verdict, unless an intervening necessity prevents. It is a principle of the common law, as well as of common sense, that what becomes necessary in the course of legal proceedings must be done. "All general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases where a strict adherence to the rule would clash with those fundamental principles are to be considered as so many exceptions to it." Kinloch's Case, Foster, Crown Law, 16.

In accordance with this principle, it is now well settled that, where there is a manifest necessity for so doing, the court may, even without the consent of the defendant, discharge a jury without a verdict, and that this will be no bar to trying the defendant again for the

[1] The concurring opinion of Canty, J., is omitted.

same offense. As to what facts and circumstances would create a legal necessity for a discharge of the jury without a verdict, it is not now necessary to consider, further than to say that it is settled that the inability of the jury to agree constitutes a moral necessity for their discharge from giving a verdict, which will prevent it being a bar to another trial. But in this connection there comes in another familiar principle in the administration of justice, viz. that in a prosecution for felony the accused must be, and has a right to be, present at every stage of the trial; at least, unless he has waived that right. He has the same right to be present at the discharge of the jury without a verdict as at any other step in the trial, for he may be able to show good reasons why they ought not to be discharged.

In this case, the defendant having been once "put in jeopardy of punishment," and the jury having been discharged without his consent, and during his enforced absence,—he not having waived his right to be present,—it seems to us that it necessarily follows that he cannot be put again in jeopardy of punishment for the same offense. 1 Bish. Cr. Proc., par. 272; State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719; Rudder v. State, 29 Tex. App. 262, 15 S. W. 717. It is true that, notwithstanding some difference of opinion as to the reason for the rule, it is now universally held that if, upon a review of the case either in the same or another court, a verdict of guilty is, upon the motion of defendant, set aside, he may be tried again for the same offense. But that is not at all analogous to the present case. The defendant has no right, under the constitutional provision now under consideration, to a review of his case after conviction, no matter how many errors may have been committed on the trial. To this right of review there may be attached such conditions as may be deemed proper; and, in availing himself of this right by asking relief from a conviction, the defendant must accept it subject to the condition imposed, which is that, if the verdict is set aside for error, he may be tried again. But in the present case the defendant is not asking for any such relief, but is merely standing upon the facts and record as they are, and asserting his constitutional immunity from being again put in jeopardy of punishment for the same offense. The demurrer to the plea ought to have been overruled.

Order reversed.

CANTY, J., concurred.

ROBERTS v. STATE.

(Supreme Court of Georgia, 1853. 14 Ga. 8, 58 Am. Dec. 528.)

The defendants, with others, were indicted for a robbery committed upon John Jackson, of said county. At March term, 1853, they filed a plea setting forth the record of a former indictment against them for burglary, upon which they had been tried and convicted, and which they averred to be the same felony, and none other, for which they were now indicted. To this plea, the Solicitor General in writing demurred, denying its sufficiency in law to operate the acquittal of the defendants. Upon consideration of such demurrer, the plea was overruled by the court, and the defendants required to answer over. * * *

STARNES, J.,[2] delivered the opinion. * * *

The main fact stated, and on which the plea rested, was that the defendants had been previously convicted on the charge of burglary, that judgment had been rendered on said conviction, and that the felony of which they had been so convicted was one and the same with the felony of which they then stood accused. Of course, the Solicitor, by so demurring, and admitting that this charge of robbery was the same felony as that of which the defendants had been convicted, intended only to admit that the two indictments related to the same transaction, and did not mean to admit that the charge was the same in each case. Taking this, then, as true, it becomes our duty to make the following inquiry: When a prisoner has been indicted for having burglariously broken and entered the dwelling of another with intent to steal the goods and chattels of the owner, and, in order to manifest such intent on the trial, proof be adduced that the prisoner did violently, or by intimidation from the person of the owner, steal such goods and chattels, and he be convicted, and afterwards an indictment for the robbery committed at the time be found against him, can he then be tried, if he plead autrefois convict, for such robbery as a separate offense?

The case made by this record invokes an answer from us to this question. The record, it is true, does not show that, upon the trial of these defendants for the burglary, that part of the evidence which was relied upon to show the felonious intent was the same with that which was offered upon the trial for robbery; but this is in effect admitted by the demurrer to the plea, as we have shown, and thus the question presented arises.

Of the sufficiency of the plea of former acquittal or conviction, the following is said to be a true test, viz.: Whenever the prisoner might have been convicted on the first indictment, by the evidence necessary

[2] The statement of facts is abridged and part of the opinion is omitted.

to support the second; or, in other words, where the evidence necessary to support the second indictment would have sustained the first. Arch. C. P. 106; Rex v. Clark, 1 B. & B. 473; People v. Barrett, 1 Johns. (N. Y.) 66; Com. v. Cunningham, 13 Mass. 245; Hite v. State, 9 Yerg. (Tenn.) 357; People v. McGowan, 17 Wend. (N. Y.) 386; State v. Risher, 1 Rich. (S. C.) 222; Durham v. People, 4 Scam. (Ill.) 172, 39 Am. Dec. 407; Com. v. Wade, 17 Pick. (Mass.) 400; 2 Hawks, 98.

This may be said to be the case in all compound felonies. 1 Ross on C. 89, note.

There seems to be some difficulty in applying this rule (as above expressed) in all cases. It may be said that the prisoner could not have been convicted on the indictment for burglary, by the proof necessary to convict on the indictment for robbery; and the evidence necessary to support the indictment for robbery would not have insured a conviction on the prosecution for burglary. If the indictment for robbery, however, had been first tried, then, upon the trial of the burglary, the proof necessary to support that last trial would have been such as would have been sufficient to sustain the first prosecution, because, after proof of the breaking and entering by the prisoner, the state would have proceeded to prove the violent stealing from the prosecutor, in order to show the breaking, etc., with felonious intent; and this would have been proof of the robbery.

To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of autrefois acquit or convict is sufficient, whenever the proof shows the second case to be the same transaction with the first. Fiddler v. State, 7 Humph. (Tenn.) 508; Thach. 206, 207. That rule is decisive of this case. * * *

The rule above stated by me is that which is prescribed for this case, and it must be the law for these defendants.

This record shows that the transaction referred to in the indictment for burglary is the same with that in the prosecution for robbery, inasmuch as the pleader, in order to show the felonious intent, has made it necessary in the former to prove the circumstances of the stealing, and thus to involve the same transaction (the robbery) in both cases. If the pleader had alleged the breaking with felonious intent (which constitutes burglary), and had been able to prove, otherwise than by proof of the robbery, that the felonious intent was manifested, then the two might not have constituted the same transaction. But this was settled by the demurrer; and the state's counsel, having elected to make his proof of felonious intent in this way, has put his case within the application of the rule.

In passing sentence upon these defendants, after the conviction in the case of burglary, the court no doubt graduated the penalty accord-

ing to the circumstances of the transaction, thus taking into consideration the proof of the robbery; for it is to be presumed that a breaking and entering of a dwelling house, accompanied by an actual robbery, would have been more severely punished than a breaking and entering with an intent to rob which was not consummated. If this be so, and the defendants have been held to some degree of punishment in consideration of the robbery, to try them again for it would be, as it were, to place them in jeopardy a second time on account of the same offense, thus in some sort violating the fundamental principle on which the plea of autrefois acquit and convict rests. Hence, again, the propriety of the rule which we recognize and apply.

On this ground, we reverse the judgment of the court. * * *

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